Supreme Court, U.S.
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No. 98-

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN G. BENNETT, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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June 1999

130 pp

QUESTIONS PRESENTED

1. Has a federal criminal offense "affected a financial institution" within the meaning of the 1990 Crime Control Act, Pub.L. 101-647, § 2507(a), 104 Stat. 4862, and the Financial Institutions Reform, Recovery and Enforcement Act, Pub.L. 101-73, 103 Stat. 183 (1989), so as to trigger a substantial Sentencing Guidelines enhancement (as well as an extended statute of limitations, certain criminal forfeitures, and other consequences), if the institution identified at sentencing was neither a victim nor a target of the offense?

2. Do rules of lenity and strict construction apply to interpretation of the United States Sentencing Guidelines, requiring the guidelines to be read narrowly, with ambiguities resolved in favor of the defendant?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (John G. Bennett and the United States).

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOHN G. BENNETT, JR., respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on November 16, 1998, affirming his sentence in what the court below called "the largest charity fraud in history." App. A2.

OPINIONS BELOW

The Opinion of the Court of Appeals (per Scirica, J., with Nygaard, J.[1]), is published. United States v. Bennett, 161 F.3d 171. A copy is attached as Appendix A. The district court's published opinion on sentencing issues, United States v. Bennett, 9 F.Supp.2d 513 (E.D.Pa. 1998), is attached as Appendix B.[2] The district court earlier wrote and published another opinion which was reviewed by the court of appeals in the same decision, but which concerns matters not pursued in this petition. United States v. Bennett, 29 F.Supp.2d 236 (E.D.Pa. 1997).

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[1] Former Chief Judge Seitz participated in the argument, but did not live to clear the opinion.

[2] This opinion was not written at the time of sentencing; it was filed after all the briefing on appeal had been completed. See App. A34-36.

JURISDICTION

The Judgment and Opinion of the United States Court of Appeals for the Third Circuit was filed November 16, 1998. Appx. A. A timely petition for rehearing was denied by Order dated January 7, 1999. Appx. C. By order dated April 1, 1999, Justice Souter granted an extension of time until June 4, 1999, for the filing of this petition. No. A-805. The petition is timely filed on by postmark on that day. Rules 13.1, 13.3, 13.5 (1997 rev.). Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL STATUTE AND SENTENCING GUIDELINES INVOLVED

Section 3353 of title 18, United States Code, provides, in pertinent part:

> **(a) Factors to be considered in imposing a sentence.** -- The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. ...
>
> **(b) Application of guidelines in imposing a sentence.** -- The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) [i.e., the USSG guideline range] unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.

Section 2F1.1 of the United States Sentencing Guidelines provides:

> §2F1.1. Fraud and Deceit ....
>
> (a) Base Offense Level: 6
>
> (b) Specific Offense Characteristics
>
> * * *
>
> (4) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency; ... increase by 2 levels ....
>
> * * *
>
> (7) If the offense --
>
> (A) substantially affected the safety and soundness of a financial institution; or
>
> (B) affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense.
>
> increase by 4 levels. ...

STATEMENT OF THE CASE

This petition presents issues that arose at the sentencing following a conditional plea of nolo contendere to charges of fraud and money laundering relating to petitioner's operation of the Foundation for New Era Philanthropy.

a. Procedural History

The petitioner, John G. Bennett, Jr., was convicted on his pleas of nolo contendere to all 82 counts of an indictment filed in the United States District Court

for the Eastern District of Pennsylvania, charging various offenses arising out of the conduct of the Foundation for New Era Philanthropy, which he founded and ran.[3] On September 22, 1997, Judge Edmund V. Ludwig imposed a sentence of 144 months' (twelve years') imprisonment, based on a downward departure from a guideline range that exceeded twenty years. See generally App. B.

On appeal, the Third Circuit affirmed. The court of appeals completely failed to address the appellant-applicant's argument that Judge Ludwig had not made the findings required by Fed.R.Crim.P. 32(c) to explain his derivation of the 20-year-plus presumptive term under the U.S. Sentencing Guidelines. App. A. The

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[3] On September 26, 1996, a grand jury returned an indictment charging petitioner with one count of bank fraud, 18 U.S.C. § 1344, 16 counts of mail fraud, id. § 1341, 18 counts of wire fraud, id. § 1343, one count of making a false material statement within the jurisdiction of a federal agency, id. § 1001, three counts of filing false tax returns, 26 U.S.C. § 7206, one count of impeding the Internal Revenue Service, id. § 7212, 15 counts of conducting transactions with the proceeds of criminal activity, 18 U.S.C. § 1957, and 27 counts of money laundering, id. § 1956(a)(1)(A)(i). CA3 App. 18-81. The count one bank fraud offense allegedly occurred between May 1989 and September 1989, CA3 App. 18-23 (under FIRREA, there is a ten-year statute of limitations for offenses under § 1344 committed after August 9, 1989; Pub.L. 101-73, 103 Stat. 183, 498-504), while the other offenses were alleged to have occurred between November 1991 and May 1995. CA3 App. 24-81.

court of appeals thus upheld various substantial enhancements to the sentence without knowing the factual bases on which the district court had imposed them. In upholding these enhancements, the two-judge panel construed broadly adjustments that other circuits, and the Sentencing Reform Act itself, would require to be narrowly and strictly applied.

Petitioner is confined at a Federal Correctional Institution serving his sentence.

b. Statement of Facts

This case was resolved on a plea of nolo contendere. The facts are summarized by the district court in its Memorandum opinion on the admissibility of certain testimony, quoting a government submission:

> [I]n 1989 the defendant engaged in a check kite. In order to cover the overdrafts from this fraud, all of which affected his personal and for profit business accounts, he deposited the first checks from his New Concepts Program into his checking account at [a] bank. The New Concepts Program was a plan in which individuals put up money for charity [to] be held for several months by the defendant's organization, the Foundation for New Era Philanthropy. [A]nonymous donors would allegedly match the money to be provided to the charity of the individual's choice - in other words, the individual's donations would be doubled. Later, the scheme expanded to allow non-profit organizations to deposit funds in the New Concepts Program. Organizations and individuals were told that their money was held in Treasury Bills at the Prudential Securities office in Kenosha, Wisconsin, but were not told that the "quasi-escrow" accounts ... was really a margin account controlled by [defendant] that frequently had a large debit balance.

... [T]he Foundation for New Era Philanthropy received tax exempt status, and a license to act as a charity in Pennsylvania, by filing documents with the Internal Revenue Service and state authorities which did not include the matching program in its list of operations. [Defendant] also filed several tax returns for tax exempt organizations which were false in that they did not refer to the matching program, listed a [non-existent] board of directors, and significantly understated New Era's liabilities. Moreover, during an [IRS] audit, [defendant] provided the auditor with fabricated board of directors minutes, and failed to disclose ... the existence of the New Era Concepts Program and the true state of [New Era's] assets.

Several of the money laundering charges are based on [defendant's] expenditures to promote New Era. Other[s] result from [his] purchases ... of homes for himself and his children, luxury cars, and first-class worldwide travel.

The anonymous donors never existed. [He] used the money from new investors to pay off earlier commitments. He expanded the program to Europe and Asia to increase sources of funds. In the last nine months before New Era's collapse ..., he drew increasingly large margin loans on his account at Prudential. ... [He] paid his accountant $50,000 to stop asking difficult audit questions.

... [I]n May, 1995 Prudential called [his] loan. Unable to meet his obligations, [defendant] agreed to put New Era into bankruptcy. ... [He] told both his staff and New Era's attorneys that the anonymous donors had never existed.

United States v. Bennett, 29 F.Supp.2d 236, 237 (E.D.Pa. 1997).

Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii). The district court's jurisdiction was properly invoked in this case under 18 U.S.C. § 3231, in that the indictment alleged the commission of federal criminal offenses. The jurisdiction of the court below rested upon 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a) and was timely invoked by Notice of Appeal filed within ten days after entry of the judgment of sentence. Fed.R.App.P. 4(b).

REASONS FOR GRANTING THE WRIT

1. The court below upheld the application of the Sentencing Guideline adjustment for "affecting a financial institution" under circumstances far afield from those which led Congress to call for enhanced criminal punishment for offenses meeting that criterion.

A sentencing guideline increase of four levels, costing petitioner between four and eight years' additional imprisonment, was added to his sentence under USSG § 2F1.1(b)(6)(B)[4] and affirmed by the court below. Those courts held that the charity fraud offenses

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[4] Since the time of petitioner's offenses, this provision has been recodified, without change, at subsection (b)(7)(B). See Statute and Guidelines involved. An identical adjustment for theft cases appears in USSG § 2B1.1(b)(6)(B), and one for commercial briberies in USSG § 2B4.1(b)(2)(B).

for which petitioner was convicted "affected a financial institution" because Prudential Securities Corp. was baselessly sued, even though it did not pay anything in damages but rather chose to settle, and claimed to have suffered harm to its "good name" and reputation. App. A51-54; 161 F.3d at 192-93.[5] New Era took no property from Prudential, but only from its own donors and from charities. Prudential suffered no "loss" and none was threatened to it at petitioner's hand.

The lawsuit against Prudential resulted from the tortious (albeit noncriminal) conduct of its own responsible employees, who agreed to lie to investors in order to please New Era. Prudential's respondeat superior liability, if any, for its employee's misconduct might make it a de jure co-perpetrator, but not a victim. This Court should grant certiorari and rule that a financial institution is not "affected" by a defendant's offense under the sentencing guidelines and cognate provisions when it risks joint liability for that misconduct; it is "affected" only if the financial institution is a victim or target of the offense.

While recognizing that this Court does not generally sit to correct misapplications of the guidelines, even where there is a conflict in the Circuits, see Braxton v.

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[5] In its post-appeal Memorandum, the district court took the even more tenuous position that "The offense 'affected a financial institution' in that defendant maintained personal and New Era accounts at several financial institutions, including Founders' Bank, the National Bank of the Main Line, and Prudential Securities." App. B15.

United States, 500 U.S. 344, 347-48 (1991), petitioner suggests that there are special reasons to do so here.

First, as discussed in the following pages, the adjustment for "affecting a financial institution" is based a statutory mandate and employs statutory language that appears elsewhere in the criminal code, with equally potent consequences to the defendant. Moreover, the Sentencing Commission has recognized dozens of conflicts in the circuits concerning the meaning of various guidelines, but has acted to resolve only a few. For the past year or more it has been virtually impotent, presently having not a single member with a current appointment. The Court should therefore consider temporarily relaxing its Braxton policy in selected, important cases. This is such a case.

The only authority supporting the panel's conclusion, United States v. Schinnell, 80 F.3d 1064, 1069-70 (5th Cir. 1996), App. A54 n.12, completely fails to consider the underlying statutory language or purpose of the financial institution adjustment. As the Ninth Circuit has recognized, criticizing the Fifth Circuit's approach in Schinnell, the "effect" on the institution allowed to be penalized in Schinnell, which was like that here, is "attenuated" and requires a "broad" application of the adjustment. United States v. Johnson, 130 F.3d 1352, 1354 (9th Cir. 1997).[6]

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[6] The Third Circuit panel in petitioner's case also cites United States v. Monus, 128 F.3d 376, 397-98 (6th Cir. 1997), cert. denied, 142 L.Ed.2d 53 (Oct. 5, 1998), see App. 53-54 n.12, but that case lends no support to the decision below, as the financial institutions in Monus

The second and even more disturbing question that underlies the (b)(6)(B) enhancement in this case -- a four level increase, making an enormous difference in the length of the sentence -- is the failure of the district court to make any finding in compliance with Rule 32 that identified the "financial institution" that petitioner's offenses "affected." Before imposing sentence, the district court had not specified the financial institution that it had in mind, nor had it stated how that institution was "affected." The parties' briefs in the court of appeals assumed the district court meant Prudential Securities, but appellant Bennett guessed differently from the government (as stated in the appellee's brief), on the issue of what "effect" was being penalized. Compare Aplt. Br. 29-30 & n.21, 46, Reply 10 with Gov't Br. 45. Then, when the district court issued its post-briefing opinion, it stated something entirely different:

> The offense "affected a financial institution" in that defendant maintained personal and New Era accounts at several financial institutions, including Founders' Bank, the National Bank of the Main Line, and Prudential Securities. See revised [sic] PSR ¶ 87-102.

App. B15. The panel below states, "We also find support for the District Court's conclusion that the offense affected several financial institutions, most directly Prudential Securities." App. A53. The Court thus affirms a non-existent finding, stating again, "The District

_____(cont'd)

were actually and directly defrauded into granting large lines of credit by the presentation of false financial statements.

Court expressly adopted these findings from the presentence report." App. A54.

If so -- and nothing in the record of proceedings prior to imposition of sentence bears that out -- then the district court violated Fed.R.Crim.P. 32(b)(6)(D), because the application of that adjustment was contested. Rule 32(b)(6)(D), after all, prohibits the sentencing court from merely adopting the PSI as a device for resolving disputes, and also from doing so only in the written judgment and not at the sentencing hearing.[7] If the adoption on which the Third Circuit relies occurred later -- in the preparation of the written judgment, for example, or in the post-appeal memorandum opinion -- then the court violated Rule 32(c)(1).[8] The panel

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[7] While not presented separately as a question warranting this Court's exercise of certiorari jurisdiction, the sentencing court's failure conduct the necessary factfinding in compliance with Rule 32(b) and (c) is a question necessarily subsumed in those presented. Rule 32(b)(6)(D) provides, "Except for any unresolved objection ..., the court may, at the hearing, accept the presentence report as its findings of fact." (emphasis added).

[8] Rule 32(c)(1), in language based on former Fed.R.Crim.P. 32(c)(3)(D), requires that:

> At the sentencing hearing, the court ... must rule on any unresolved objections to the presentence report. ... For each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the

opinion in the Court below simply disregards the sentencing court's pervasive violations of the governing rules of procedure.

Prudential Securities was not a victim or target of an offense committed by Mr. Bennett, and therefore was not "affected" by it within the meaning of USSG § 2F1.1(b)(6)(B). Subsection (b)(6)(B) was added to USSG § 2F1.1 to "implemen[t] the instruction to the Commission in Section 2507 of Public Law 101-647." USSG § 2F1.1, background.[9] That section is part of the "Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990," enacted as title XXV ("Banking Law Enforcement") of the 1990 Crime Control Act. The statute in question provides:

> [T]he United States Sentencing Commission shall promulgate guidelines, or amend existing guidelines, to provide that a defendant convicted of violating, or conspiring

_____(cont'd)

> controverted matter will not be taken into account in, or will not affect, sentencing.

The amendment of Rule 32 which substituted subsection (c)(1) for the predecessor (c)(3)(D) did not change the requirements of the rule. See Fed.R. Crim.P. 32(c), Adv. Com. Note (1994 amend.) ("Subdivision (c) ... makes no major changes in current practice. ... Subdivision (c)(1) ... requires only that the court rule on any objections before sentence is imposed."

[9] At the same time, subsection (b)(7)(B) was added to USSG § 2B1.1, and subsection (b)(2)(B) was added to § 2B4.1.

> to violate, section 215, 656, 657, 1005, 1006, 1007, 1014, 1032, or 1344 of title 18, United States Code, or section 1341 or 1343 affecting a financial institution (as defined in [18 U.S.C. § 20], shall be assigned not less than offense level 24 under chapter 2 of the sentencing guidelines if the defendant derives more than $1,000,000 in gross receipts from the offense.

Pub.L. 101-647, § 2507(a), 104 Stat. 4862 (Nov. 29, 1990). The list of specific statutes consists of financial crimes against banks and similar institutions. Sections 1341 and 1343, the only violations that Congress specified in § 2507 must have "affect[ed] a financial institution" to merit an enhanced guideline range, are the mail and wire fraud statutes, which do not inherently require that the victim of the scheme to defraud be a financial institution.

Implementing § 2507's mandate the Commission went far beyond Congress's direction. The "financial institution" adjustments it created are not limited to the listed offenses, but rather apply potentially to all fraud, theft and commercial bribery cases. Moreover, the Commission adopted its own definition of "financial institution," far broader than that provided in 18 U.S.C. § 20, as Congress had directed. Even assuming that the Sentencing Commission did not exceed its authority under this Congressional mandate by applying the enhancement to all theft (and fraud) offenses, and not just those expressly listed by Congress,[10] see United

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[10] There is nothing in the Commission's Background

States v. Lauer, 148 F.3d 766, 768-70 (7th Cir. 1998) (Posner, Ch.J.) (discussing this problem), the guideline nevertheless can only be understood in light of what those specified offenses have in common. Interpreting this statute in light of the principle of ejusdem generis, it is apparent that Congress meant (and thus that the Commission, in "implementing" this law should be deemed to have meant) to use the term "affecting" in the same sense that the first list of offenses -- which includes bank bribery (§ 215), embezzlement from a bank and misapplication of bank funds (§§ 656-657), false statements to a bank or other financial institution (§§ 1005-1007, 1014), concealment of assets from FDIC as receiver (§ 1032) and bank fraud (§ 1344) -- inherently "affect" a financial institution. Those offenses are by their nature directed against the institution and its assets.

The (b)(6) adjustment seeks to punish individuals who commit major bank crimes (including all forms of theft and fraud targeting and victimizing financial institutions) and who derive over $1 million from such offenses. This is not such a case.

Neither the fact that Prudential was sued by the trustee, paying nothing in damages but rather choosing to settle, nor that it claims to have suffered harm to its "good name" and reputation, could support a conclusion that petitioner Bennett's offenses "affected" a financial institution within the meaning of USSG § 2F1.1(b)(6)(B). Nothing that happened to Prudential would count as

_____(cont'd)

Note or in Amendment 364's discussion that acknowledges any awareness that the Commission had exceeded the terms of its mandate when it implemented § 2507.

"loss" under § 2F1.1(b)(1) or for restitution purposes, for example. See United States v. Marlatt, 24 F.3d 1005 (7th Cir. 1994) (amounts paid to settle resulting suits are consequential or incidental damages, not "fraud loss" under guidelines); United States v. Pollak, 844 F.2d 145, 152-54 (3d Cir. 1988) (victim's legal and other costs of repossessing property not recoverable through restitution).

Congress used the same language -- "that affects a financial institution" -- in the 1989 S&L "bailout" law to expand other prosecutorial powers in banking-related federal criminal cases. Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA"), Pub.L. 101-73, 103 Stat. 183 (1989). A broad and unchanneled interpretation of that language could thus not only upset the carefully proportioned sentencing guideline system, but also have dire consequences in other realms of federal criminal law. See 1 John K. Villa, *Banking Crimes* § 7.01[2], at 7-6 to 7-8 (1998 rev.) (noting several implementations of this criterion, and criticizing broad reading). For example, 18 U.S.C. § 3293(2) allows a ten-year statute of limitations in such cases, rather than the usual five years. See United States v. Aubin, 87 F.3d 141, 147 (5th Cir. 1996); United States v. Pelullo, 964 F.2d 193, 216 (3d Cir. 1992). Civil and criminal forfeiture penalties can be invoked in mail and wire fraud cases if they "affected a financial institution," but not otherwise. See United States v. Douglas, 55 F.3d 584 (11th Cir. 1995). Such mail or wire fraud violations can be predicates for a prosecution for a "Continuing Financial Crimes Enterprise," 18 U.S.C. § 225, and not otherwise. See United States v. Lefkowitz, 125 F.3d 608, 618 (8th Cir. 1997); United States v. Harris, 79 F.3d 223 (2d Cir. 1996).

Just as the New Era fraud offenses could not properly have been prosecuted ten years after they were committed by invoking § 3293(2),[11] so the application of the (b)(6)(B) guideline adjustment, based on the same language, was improper here and should have been rejected. To give consideration to this recurrent and problematic sentencing enhancement, and to reign in its overly-expanded use (as further discussed under Point 2 below in light of the rule of lenity), this Court should issue a writ of certiorari to review the judgment and opinion of the court of appeals.

2. The circuits require this Court's guidance on the question whether the "rule of lenity" and the principle of strict construction apply to the interpretation of the United States Sentencing Guidelines where there are ambiguities in their phrasing.

Many years were added to petitioner Bennett's lengthy sentence because of enhancements to the fraud guidelines under USSG §§ 2F1.1(b)(3)(A) and (b)(6)(B). This Court should review and reject the lower courts' misapplications and extensions of these sentencing enhancements. This case presents a recurring issue of grave importance in federal sentencing, because the two-judge panel decision consistently chooses the more severe of the available constructions of the guidelines, in

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[11] In this case, the one count of bank fraud in violation of 18 U.S.C. § 1344, which preceeded the other offenses by some time, was indicted and prosecuted on the authority of § 3293.

contradiction of most circuits' established application of the rule of lenity to guideline construction questions.

The court below gave a broad construction not only to the "financial institution" adjustment, as discussed under Reason 1 ante, but also to a guideline enhancement for "misrepresentation of acting on behalf of a charity." 161 F.3d at 190-92; App. A46-51. While there is little doubt that frauds were perpetrated in the operation of the New Era Foundation, and in particular in its New Concepts program, the opinion of the court of appeals fails to show how Mr. Bennett "misrepresented that [he] was acting on behalf of a charitable [or] religious organization," which is particular form of misconduct, and the only conduct, for which this particular adjustment adds additional punishment. The Tenth Circuit has recognized, as court below acknowledged (App. A48), that this guideline adjustment should not in any fashion be extended in its scope. See United States v. Frazier, 53 F.3d 1105, 1111-15 (10th Cir. 1995).[12] The

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[12] The Tenth Circuit in Frazier properly refused to follow or extend the holding in United States v. Marcum, 16 F.3d 599, 603 (4th Cir.), cert. denied, 115 S.Ct. 137 (1994), which upheld an application of this adjustment to a sheriff who skimmed 10% of the take from a nonprofit bingo game. In two sentences of discussion, without any legal or linguistic analysis, the Fourth Circuit read into the defendant's actions the implied (but untrue) assertion that he was "conducting the bingo game wholly on behalf of" the charity, and apparently read into the guideline a further requirement of zero dishonest personal gain. The panel opinion here gives Marcum an uncritical citation,

Third Circuit failed to follow this lead, or to apply a more general rule of strict construction or a rule of lenity. The court below thus expanded rather than limited the guideline's wording.

The guideline manual adds two levels to the offense calculation in a fraud case when "the offense involved ... a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency ...." USSG § 2F1.1(b)(3)(A). This adjustment plainly applies, for example, when a defendant fraudulently induced victims to part with their money by claiming to be soliciting on behalf of a respected charity with which the defendant, in fact, has no connection. See, e.g., United States v. Starr, 986 F.2d 281 (8th Cir. 1993) (per curiam) (theory apparently accepted, but sentence reversed for failure to prove defendant not authorized to act for named charity). It would also apply, for example, where the defendant persuaded victims to part with their money by lying about the existence of a fictitious charitable organization which is, in fact, nothing but a front for the defendant's bank account. E.g., United States v. Whatley, 133 F.3d 601, 607 (8th Cir. 1998).[13] Likewise,

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App. A50 n.11, when it should have been firmly disavowed. The Fourth Circuit recently followed and thus helped entrench the misapplication established in Marcum. See United States v. Aramony, 166 F.3d 655, 663-64 (4th Cir.), cert. denied, No. 98-1720 (June 1, 1999).

[13] Compare United States v. Fletcher, 47 F.3d 1176 (9th Cir. 1995) (table; text on WestLaw and CD-ROM)

the adjustment would clearly apply to a genuine representative of a genuine charitable or religious body who simply pocketed the money donated without turning it over. See, e.g., United States v. Lilly, 37 F.3d 1222 (7th Cir. 1994), cert. denied, 115 S.Ct. 1155 (1995). See generally USSG § 2F1.1, appl. note 4.

Petitioner's conduct corresponded to none of those easy cases, however. The defense proffered substantial evidence that the Foundation for New Era Philanthropy was a genuine "charitable organization" in the ordinary sense of the word, and the court below accepted this, at least arguendo. App. A49. Indisputably, petitioner actually acted "on [its] behalf" at all times. The court below, however, substituted a theory that "in giving money to New Era, donors had a right to expect that their contributions would be used in the manner that Bennett had promised." App. A49; 161 F.3d at 191-92. No doubt this is so, but it is not the premise articulated by the Commission for adding this increase to a fraud sentence.

New Era was a qualified IRC § 501(c)(3) organization. Petitioner was convicted under Counts 37 through 39 of causing New Era to file false annual returns (IRS Form 990) for New Era. On this basis, the government argued below that New Era was not even a "charitable organization" within the meaning of § 2F1.1-(b)(3)(A). That theory is entirely without merit. Having § 501(c)(3) status is not conclusive proof that an entity is,

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(adjustment reversed for failure to prove any "misrepresentation that the defendant 'was acting on behalf of a charitable ... organization.'" [ellipsis original]).

in fact, a "charitable organization." See, e.g., United States v. Smith, 133 F.3d 737, 744-46 (10th Cir. 1997) ("Say No Now," although awarded 501(c)(3) status, found at sentencing to be nothing but fraud scheme; therefore, truthful statement that defendant represented SNN was "misrepresentation" that he acted "on behalf of" a charity); United States v. Baggett, 129 F.3d 128 (9th Cir. 1997) (table; text on WestLaw and CD-ROM) (same). By the same token, however, not every tax-law violation by a qualified non-profit takes it outside the definition of "charitable" under the guidelines. To serve the purpose of this adjustment without exceeding either its intended scope or its plain language, the issue should be whether the real (or pretended) organization in question is (or purports to be) primarily organized and operated for eleemosynary (or religious,[14] educational or political) rather than selfish or mercenary purposes.

Most circuits have held that the "rule of lenity" applies to guideline construction, see United States v. Sanders, 162 F.3d 396, 402 (6th Cir. 1998) ("rule of lenity

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[14] Naturally, in determining whether a defendant "misrepresented" that s/he was acting "on behalf of" a religious organization, a court must exercise special care, in light of the First Amendment, not to judge the reasonableness or truth of the defendant's or the organization's religious beliefs or principles. See United States v. Ballard, 322 U.S. 78, 86-87 (1944); Callahan v. Woods, 658 F.2d 679, 685 (9th Cir. 1981) (Adams, J., sitting by designation: "courts may not inquire into the truth, validity or reasonableness of a claimant's religious beliefs").

should clearly be utilized ... where, as here, there is no clear language in the Guideline or the Commentary to support that increased sentence"); United States v. Booker, 70 F.3d 488, 492 n.18 (7th Cir. 1995) (collecting some cases); United States v. Cheape, 889 F.2d 477, 480 n.8 (3d Cir. 1989) (Becker, J.). Some, however, have disputed the applicability of the doctrine in this non-statutory context. United States v. Mrazek, 998 F.2d 453, 455 (7th Cir. 1993) (Easterbrook, J.); see United States v. Torres-Echavarria, 129 F.3d 692, 700 n.3 (2d Cir. 1997) (Jacobs, J., viewing applicability as doubtful); United States v. Westcott, 159 F.3d 107, 117 n.5 (2d Cir. 1998) (noting government's "assertion" that doctrine does not apply); cf. United States v. McEntire, 153 F.3d 424, 438 & n.16 (7th Cir. 1998) (distinguishing "rule of lenity" from "principles of lenity" in this context).

A Rule of Lenity applies to the judicial resolution of ambiguities in sentencing statutes. See United States v. R.L.C., 503 U.S. 291, 305 (1992); Bifulco v. United States, 447 U.S. 381 (1980); Busic v. United States, 446 U.S. 398, 406-07 (1980); Ladner v. United States, 358 U.S. 169, 178 (1958). This Court should grant the petition in this case to make clear that the rule of lenity applies to ambiguities in the guidelines, just as it does to sentencing statutes. Cf. Babbitt v. Sweet Home Chapter of Communities for Greater Oregon, 515 U.S. 687, 703 n.18 (1995) (considering but not deciding whether rule of lenity would apply to interpretation of regulation enforceable through statutory criminal penalty).

Since it is at best doubtful that an undisclosed fraudulent program or motive turns a defendant's acts on behalf of a genuine charity into a "misrepresentation" that he or she is "acting on behalf of" that charity, there is

a "grievous ambiguity or uncertainty in the statute." Muscarello v. United States, 524 U.S. 125, 118 S.Ct. 1911, 141 L.Ed.2d 111, 122 (1998) (quoting earlier cases). In other words, "after seizing everything from which aid can be derived," it is possible only to "guess as to what [the drafter] intended." Id., quoting Reno v. Koray, 515 U.S. 482, 499 (1995). Thus, the rule of lenity requires that the statute be given the narrower scope. Ratzlaf v. United States, 510 U.S. 135, 148-49 (1994).

The same rule must apply to guideline interpretation. Even giving "due deference to the district court's application of the guidelines to the facts," 18 U.S.C. § 3742(e), the Third Circuit's conclusion is insupportable. To the contrary, petitioner's sentence "was imposed in violation of law," id. § 3742(e)(1), and "as a result of an incorrect application of the sentencing guidelines," id. § 3742(e)(2), because it is inconsistent with the "principle of parsimony" Congress built into the present sentencing system: "The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of punishment, as set forth in the Act." 18 U.S.C. § 3553(a) (emphasis added);[15] see also id. § 3553(b) (court also "shall impose" sentence within guideline range, properly computed, absent legitimate departure). These doctrines are applicable to the Commission as well as to the courts. See 28 U.S.C. § 994(b)(1) (guidelines must be designed so as to comply with all provisions of title 18, including § 3553(a)).

The result of the lower courts' overbroad reading of the charity and financial institution adjustments in this

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[15] See Statute Involved, ante, for text of § 3553.

case was the unjustified addition of several years to petitioner's already-heavy sentence. This Court should grant certiorari to review and reverse the decision below, and the case must then be remanded for resentencing.

CONCLUSION

For the foregoing reasons, petitioner JOHN G. BENNETT prays that this Court grant his petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit affirming his sentence.

Respectfully submitted,

S/ PG

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June 4, 1999.

APPENDIX A

161 F.3d 171
82 A.F.T.R.2d 98-7204

UNITED STATES of America
v.
John G. BENNETT, Jr., Appellant.

No. 97-1816.
United States Court of Appeals,
Third Circuit.
Argued June 4, 1998.
Decided Nov. 16, 1998.

*173 Peter Goldberger (Argued), Ardmore, Pennsylvania, for Appellant.
Richard W. Goldberg (Argued), Judy Goldstein-Smith (Argued), Office of United States Attorney, Philadelphia, Pennsylvania, for Appellee.

Before: SCIRICA, NYGAARD and *174 SEITZ,* Circuit Judges.

OPINION OF THE COURT

SCIRICA, Circuit Judge.

This is an appeal from a judgment of sentence and certain pretrial rulings on a nolo contendere plea entered by defendant John G. Bennett, Jr., President of New Era

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* Judge Seitz heard argument in this matter but was unable to clear the opinion.

Philanthropy. Bennett was sentenced to 144 months in prison for perpetrating the largest charity fraud in history, a six-year scheme in which he solicited over $350 million in contributions for a bogus "matching" program. We will affirm.

I. FACTUAL BACKGROUND AND PROCEEDINGS

In 1989, Bennett encountered financial difficulties in connection with several of his businesses. As a consequence, he devised a check-kiting scheme using his bank accounts at Philadelphia National Bank and Merrill Lynch, writing checks from one account to another on insufficient funds and creating false balances reflecting fictitious amounts. To cover the overdrafts, Bennett solicited participation in a new program called the New Concepts in Philanthropy Program, using the initial checks received from New Concepts donors to pay down the overdrafts at Merrill Lynch and the Philadelphia National Bank.

Under the New Concepts Program, individual donors gave money for charitable purposes to be held for several months by another Bennett organization, the Foundation for New Era Philanthropy. Bennett told potential investors that a wealthy donor, who wished to remain anonymous, would match their contributions at the end of the holding period. The doubled funds would then be transferred to a charity of the donor's choice.[1] In

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[1] Bennett made the following sales pitch to wealthy individuals:

> An anonymous donor wants to encourage giving by offering to match charitable gifts to various organizations. To participate, wealthy individuals

reality, there was no anonymous donor. Bennett used the donations of subsequent investors to "double" the deposits of the original investors, and he routinely invaded the held funds to benefit his for-profit businesses.

The "ponzi" scheme grew into a pyramid scheme as the base of investors grew.Bennett expanded the New Concepts Program to allow nonprofit organizations to participate.[2] Eventually, the Foundation for New Era

_____(continued)

> deposit their funds with New Era for a period of time. At the end of the holding period, the gift will be matched by the anonymous donor and the now doubled funds will be sent to the charity chosen by the original donor.

(Presentence Investigation Report (PIR) ¶ 18.)

[2] While the basic proposal did not change during the existence of New Era, features of the offer did change; for example, Bennett broadened the donor base and delayed the payout period:

> a) Expanding base of participation: The parties eligible to have their funds matched grew from the small number of original donors to over a hundred individuals. Later, in 1993, non-profit organizations were also permitted to participate, and by the end, hundreds had sent funds to New Era. New Era also opened offices in London and Hong Kong and made overtures to the mainland government. Meanwhile, in New Era's literature, the number of alleged anonymous donors grew from one to nine.
>
> b) Fewer deposit restrictions: At first, non-profit

Philanthropy received both tax-exempt status and a license to act as a charity in Pennsylvania. Bennett established and maintained these licenses through a series of falsehoods. For example, he omitted any mention of the matching program from all documents filed with the Internal Revenue Service or state authorities. In these submissions, Bennett also listed a nonexistent board of directors consisting of prominent individuals and he significantly underestimated New Era's liabilities. During a subsequent I.R.S. audit, Bennett provided fabricated board-of-directors minutes, again failed to disclose the existence of the New Concepts Program, and *175 misrepresented the true condition of New Era's assets. As a result, New Era received a favorable audit letter from the I.R.S.

In response to due diligence inquiries by potential donors, Bennett made additional false representations:

a) The anonymous donors had signed trust agreements pledging to match contributions made through New Era.

_____(continued)

organizations could only deposit newly raised money with New Era. This restriction was later dropped and organizations were permitted to deposit their endowment funds.

c) Longer holding period and greater payout: Just months before the end, New Era offered a fund which would pay 150% interest ($2.50 would be returned for each $1.00 invested). The holding period would be nine months rather than six months.

(PIR ¶ 19.)

b) The anonymous donors matched the funds deposited with New Era.

c) Bennett received no compensation from New Era.

d) New Era had a board of directors made up of prominent individuals.

e) Funds deposited with New Era were held in escrow or "quasi-escrow"accounts.

f) The expense of running New Era was paid from the interest earned by deposited funds during the holding period.

Having satisfied investors and auditors that New Era was a legitimate charity, Bennett then systematically transferred New Era funds to his struggling for-profit businesses through loans and stock purchases.

By 1994, Bennett could no longer cover the "doubled" funds solely through new donations. Consequently, he obtained a loan from a brokerage account at Prudential Securities to cover the shortfall. The loan was secured by United States treasury bills that Bennett had purchased with funds donated to New Era by charitable organizations. Bennett informed several of these organizations their money was invested in United States treasury bills and they could call Prudential to confirm that a treasury bill had been purchased in the name of the organization. But instead of revealing the treasury bills were serving as collateral for a loan, Bennett told the organizations their money was being held in low-risk, interest-bearing accounts and escrow or "quasi-escrow" accounts at major financial institutions. The Prudential loan eventually totalled $50 million.

In the final nine months before New Era's collapse, Bennett drew increasingly larger margin loans

on his account at Prudential. In May 1995 Prudential called the loan. Unable to meet his obligations, Bennett agreed to place New Era into bankruptcy and then revealed the anonymous donors had never existed.

In September 1996, Bennett was charged in an eighty-two-count indictment for offenses committed in connection with the Merrill Lynch and Philadelphia National Bank accounts. The indictment charged Bennett with one count of bank fraud (18 U.S.C. § 1344), sixteen counts of mail fraud (18 U.S.C. § 1341), eighteen counts of wire fraud (18 U.S.C. § 1343), one count of making false statements to the government (18 U.S.C. § 1001), three counts of filing false tax returns (26 U.S.C. § 7206), one count of impeding the administration of revenue laws (26 U.S.C. § 7212), fifteen counts of money laundering (18 U.S.C. § 1957), and twenty-seven counts of money laundering to promote unlawful activity (18 U.S.C. § 1956(a)(1)(A)(i)). Bennett originally pleaded not guilty and prepared for trial. Before trial, the District Court ruled to exclude certain questions that Bennett proposed to ask of his expert witness regarding Bennett's mental capacity.

In March 1997, Bennett decided to enter a conditional plea of nolo contendere to all the charges.[3] In an accompanying press release, Bennett emphasized he did not admit guilt or "adopt as true the government's version of the facts, insofar as those facts relate in any way to the issue of his intent to commit the crimes

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[3] Bennett reserved the right to appeal pretrial rulings as to the admissibility of his expert's testimony on mental health.

alleged in the indictment." Following Bennett's entry of the nolo contendere plea, the Probation Office compiled its Presentence Investigation Report in anticipation of the sentencing hearing.

A. The Presentence Investigation Report

The presentence report grouped the charges as follows: (1) bank fraud; (2) mail fraud; (3) wire fraud; (4) false statements; (5) false tax returns; and (6) impeding the administration of revenue laws. It then calculated *176 Bennett's adjusted offense level beginning with a base offense level of six under U.S.S.G. § 2F1.1. The presentence report recommended against a reduction in the base offense level for acceptance of responsibility under U.S.S.G. § 3E1.1:

> The defendant has entered a plea of nolo contendere in this case. However, he continues to deny any factual guilt and criminal intent for his actions. In his press release dated March 26, 1997, announcing his plea of nolo contendere, the defendant stated that he does not admit or adopt as true, the government's version of the facts, insofar as those facts relate in any way to the issue of his intent to commit the crimes alleged in the Indictment. The defendant further stated in his press release that he believes that his choice to cooperate with the bankruptcy trustee by surrendering substantially all of his assets to the trustee, which he claims had no relation to New Era, and to cooperate with the Attorney General of the Commonwealth of Pennsylvania and the United States Securities and Exchange Commission regarding civil enforcement activities brought by those entities regarding the collapse of New Era,

> indicates that he has accepted responsibility. It appears that his choice to cooperate with the bankruptcy trustee and the other parties bringing civil action against him benefits him in the same way as his plea of nolo contendere in the criminal matter. In other words, the defendant arrives at an outcome which may have been inevitable anyway, but with much less negative publicity and stress to himself and his family. His cooperation is not an indication that he admits wrongdoing. In fact, he stated as much in his press release. Furthermore, the defendant's for profit companies received approximately $7 million as a result of his fraudulent activities, which ultimately resulted in benefit to him.

The presentence report also called for an eighteen-level increase for the loss caused by Bennett's conduct, suggesting "[t]he loss in this case at the time the offense was discovered was approximately $135,000,000; although the total amount of funds taken from the victims was approximately $354 million. Pursuant to § 2F1.1(b)(1)(S), because the loss in this case was over $80 million, 18 levels are added." It also recommended that two levels be added because the offense involved "more than minimal planning" under 2F1.1(2)(A) and (B): "[T]he defendant committed repeated fraudulent acts over a period of time, and ... this offense involved a scheme to defraud more than one victim."

The report suggested an additional two-level increase because the criminal conduct involved the misrepresentation that Bennett was acting on behalf of a charitable, educational, religious, or political organization:

> The misrepresentation took place in three ways. First, the defendant was able to secure a favorable rating from the Internal Revenue Service for the Foundation for New Era Philanthropy as a charitable organization, by submitting fraudulent documentation to the IRS, and by failing to disclose information regarding the New Concepts program to the IRS. The defendant did this knowing that the New Concepts program was in fact, a fraudulent scheme. The second aspect of the misrepresentation was the New Concept program itself, wherein the defendant told the victims of non-existent anonymous donors, in an effort to solicit contributions from them. In addition, the defendant used the favorable rating that he fraudulently received from the IRS to solicit funds from the victims. The third aspect to the misrepresentation is that the defendant used the charitable image of New Era to divert several million dollars to his for profit companies, which ultimately benefited the defendant personally. Pursuant to § 2F1.1(b)-(3)(A), two levels are added.

Invoking § 2F1.1(b)(6)(B), the report also recommended a four-level increase because Bennett derived more than one million dollars in gross receipts from an offense affecting a financial institution. Specifically, the report noted Bennett "used a brokerage account at Prudential Securities to obtain sufficient funds to facilitate this offense. Overall, the loan from Prudential to New Era was approximately $50 million."

The report also recommended upward adjustments for Bennett's "aggravating role" in *177 the offense and for his abuse of a position of trust. First, it described Bennett's role in the offense:

> [Bennett] was the organizer and leader of New Era, which was used in the commission of an extremely extensive fraud. Several employees carried out the defendant's orders which served to facilitate this offense. Most of the employees were unaware of the defendant's fraudulent activities; however, to date the defendant's accountant has entered a plea of guilty to charges related to this offense. In addition, the defendant utilized the services of many other innocent individuals to promote the goals of New Era. Pursuant to § 3B1.1(a), the offense level is increased by four levels.

Next, the report discussed the position of trust Bennett occupied: "[Bennett] was entrusted as a fiduciary by the victim organizations. The defendant abused the trust placed in him by these organizations by diverting money to his for profit companies, which had been entrusted to him for charitable purposes."

These enhancements created a subtotal adjusted base offense level of thirty-eight for the first group of closely related counts. The second group of closely related counts consisted of money laundering and money laundering to promote unlawful activity. Under U.S.S.G. § 2S1.1(a)(1), Bennett had a base offense level of twenty-three. The presentence report called for a three-level enhancement based on the amount of money laundered: "approximately $528,016. Pursuant to § 2S1.1(b)(2)(D), since the value of the funds was more than $350,000, but less than $600,001, the base offense level is increased by three levels." The District Court explicitly adopted the factual findings and guideline application of the presentence report in its judgment and commitment order.

B. The Sentencing Hearing

In September 1997 the District Court held a four-day sentencing hearing. At the close of testimony, the court commented on the burden of proof: "[T]he defense's position is that the government must meet its burden of proof by clear and convincing evidence. While I believe the correct standard is a preponderance of the evidence, the evidence presented is sufficient to meet the higher standard." The court then made several findings with respect to enhancements to the base offense level:

> [F]or the amount of the loss 18 levels are added because the loss was more than $80 million, in this case at least $100 million. Next, two levels are added for more than minimal planning, which is not in dispute. Next, two levels are added because the offense involved misrepresentation that the defendant was acting on behalf of a charity. Next, two levels are added because the offense affected a financial institution and the defendant derived more than $1 million in gross receipts from the offense.
>
> Next, four levels are added because of the defendant's role in the offense as an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive. And next, two levels are added because defendant abused a position of trust in a manner that significantly facilitated the commission or concealment of the offense.
>
> Correction as to the specific offense characteristic involving a financial institution and that defendant derived more than a $1 million in gross receipts from the offense, it should be four levels are added, not two as I mis-spoke.

> After I ruled that certain testimony from his mental health experts would be inadmissible at trial, Mr. Bennett entered a conditional nolo contendere plea, conditional in that he reserved the right to appeal my ruling.
>
> * * *
>
> The request by the defense for a decrease based on acceptance of responsibility must be denied. To obtain this decrease the guidelines require that the defendant clearly demonstrates acceptance of responsibility for the offense, which did not occur in this case.

At the close of sentencing, the District Court made additional remarks addressing the "aggravating *178 role" and "abuse of a position of trust" enhancements:

> Moreover, the argument that others, such as Prudential, Andrew Cunningham and the lawyers helped walk Mr. Bennett down the garden path must also be rejected. Whether or not anyone whose services he utilized assisted him in his request in carrying out these offenses does not diminish his role in it. It can well be argued to the contrary. Unfortunately, a person's conduct often differs from what one says or professes to believe in.
>
> * * *
>
> In addition to misapplying funds that were entrusted to him, he also obtained very large amounts of money for his personal benefit. He had total control over both New Era and his for profit corporation and thereby channeled money that came into New Era to pay himself, while maintaining that he was serving New Era without charge.

Bennett's offense level and criminal history category targeted a guideline range of 235-293 months imprisonment. But the District Court determined a downward departure was appropriate:

> [T]he law requires that the sentence imposed reflect the seriousness of the offense. Given the enormity and gravity of this case, a guidelines range sentence on that basis could be justified. The amount of harm and the number of persons harmed and the still ongoing repercussions experienced by the charities and nonprofit organizations and those who benefit from their activities are incalculable. It may well be that any lesser sentence than within the guidelines range will be criticized as under-representing or depreciating the inordinate size and gravity of the damage done in this case.
>
> However, I have determined to make a downward departure from the guidelines range by reason of the presence of three factors or grounds. Each of these departure factors is found to be sufficient by itself to support the extent of the departure. But whether taken singularly or in any combination, they do not in my view justify any further departure because of the seriousness of the offense.
>
> Moreover, certain departure factors requested by the defense must be denied. The sentencing guidelines contain policy statements that discourage the consideration of various factors in determining whether a sentence should be outside the guidelines range. The reason is that these factors, at least to the extent that they are gener-

ally present in a case, have already been included in the sentencing guideline categories.

The Supreme Court has said that these so-called discouraged factors may be a basis for departure only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present. Discouraged factors include age, family responsibilities and community ties and employment records. And none of these factors in this case is sufficient individually or in combination to be the basis for a departure.

One discouraged factor that is present to an exceptional degree is called military, civic, charitable or public service employment related contributions, record of prior good works. It is evident that for many years leading up to 1989 Mr. Bennett made a large number of civic, charitable and public service contributions and performed good works in the areas of substance abuse, children and youth, juvenile justice.

These went far beyond the community contributions generally made even by very civic minding and good-hearted people. They are the first basis for the downward departure. No credit is given for contributions and activities after 1989 because of their interrelationship with the offense conduct.

The next separate basis for departure is extraordinary cooperation and restitution. Through the exceptional work of the trustee, the Bankruptcy Court and Judge [Dalzell] of this Court, the amount of the New Era loss was reduced from over $100 million to about $20 million. Mr.

> Bennett's cooperation and his turning over the bulk of his personal and company held assets *179 greatly facilitated this process and occurred to an unusual degree. Our Court of Appeals has recognized that such efforts may distinguish a case and if so, may warrant departure.

The third basis for departure involved Bennett's mental capacity, which the District Court considered "problematical":

> On the one hand, a discouraged departure factor is called mental and emotional conditions. On the other hand, an encouraged factor is called diminished capacity.
>
> * * *
>
> If a factor is an encouraged factor, it is a basis for departure unless the applicable guidelines already take it into account, which is not this case. The subject of Mr. Bennett's clinical condition and applicable diagnoses has been hotly debated by a number of prestigious mental health experts. While it appears unlikely that he had a delusional disorder or more than, at worst, a mild organic brain dysfunction, there is evidence of severe personality disorders, including narcissism, hypomania, obsessive-compulsive personality, at least some of which is agreed to or not contested by the government's experts.
>
> A complicating factor is that while personality disorders are listed in the Authoritative Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association, many clinicians do not believe a personality disorder is any more than a description of one's

personality. They therefore distinguish it from a mental disease or disability and reject it as a basis for legal judgment.

Court cases, however, have not seen fit to make that distinction, particularly recently. In the present case, Mr, Bennett devised and developed and completely managed what became an extremely large financial enterprise. The evidence is that on one level he believed his work was consistent with his religious beliefs and God ordained mission. It appears that he not only was convinced himself, which usually is basic to convincing others, but he also convinced many responsible established and highly successful executives and religious, educational and other community institutions, as well as many social and political leaders.

Here, whether this basis for departure is grounded in an extraordinary mental and emotional condition under the discouraged factors or in a diminished capacity under the encouraged factors it appears from all the evidence that Mr. Bennett's cognition of volition or both were subject to a very unusual distortion and significantly reduced mental capacity.

Therefore, the District Court departed downward 91 months and imposed a sentence of 144 months imprisonment.

II. DISCUSSION

A. Pretrial Rulings Concerning Expert Testimony

Before deciding to plead nolo contendere, Bennett had filed notice of his intent to rely on the defense of insanity and to offer both lay and expert testi-

mony on his mental condition. After Bennett requested a hearing to determine the admissibility of expert testimony on his mental disorders, he and the Government filed a joint submission containing a "Summary of Questions and Anticipated Responses." The District Court held the requested hearing and thereafter issued an order disallowing certain submitted questions.

Ten "General Questions" were submitted, two of which were:

> Q: In your opinion, to a reasonable degree of medical certainty, do you believe that the mental orders you state Mr. Bennett suffers from precluded him from forming the intent to defraud?
>
> Q: In your opinion, to a reasonable degree of medical certainty, do you believe the mental disorders you state Mr. Bennett suffers from make it highly unlikely that he could form the intent to defraud?

The District Court determined:

> 1. As to all General Questions excepting the last two, objections based on F.R.E. 702 and 403 are overruled. Rulings are deferred as to relevance, *180 F.R.E. 401. To have probative value, answers must provide sufficient fact basis for a finding of lack of actual mens rea. Objection to the use of the word "facts" in the third question is sustained.
> 2. As to the last two General Questions (opinions as to forming intent to defraud), objections are sustained. F.R.E. 704(b).

United States v. Bennett, 29 F.Supp.2d 236 (E.D.Pa.1997) (Pretrial rulings). Three questions relating to bank fraud were submitted, the last of which stated:

Q: In your opinion, to a reasonable degree of medical certainty, did any of the mental disorders that Mr. Bennett suffers from make it unlikely that he would have engaged in conduct designed to defraud a bank?

Citing Federal Rule of Evidence 704(b), the District Court sustained the Government's objection to this question, but overruled the objection to the first two bank fraud questions: "[T]he words 'affected' and 'affect,' in the context used, are vague and unclear, and to the extent that they request an opinion or inference as to 'whether defendant possessed a mental state or condition constituting an element of bank fraud,' objections are sustained. Otherwise, rulings as to relevance are deferred." *Id.* at 236-37.

The District Court sustained the Government's objections to four questions on mail and wire fraud, again invoking Rule 704(b). The questions were:

Q: In your opinion, to a reasonable degree of medical certainty, did Mr. Bennett's mental disorders preclude him from forming the specific intent to defraud individuals through the operation of the New Concepts program?

Q: If so, how?

Q: In your opinion, to a reasonable degree of medical certainty, did Mr. Bennett's mental disorders make it unlikely that he could defraud the individuals and entities involved with New Concepts?

Q: If so, how?

The District Court sustained all objections to the questions on false statements because the "questions do not relate to actual mens rea. They also appear to ask for

impermissible opinion or inference in violation of Fed.R.Evid. 704(b)." *Id.* at 237. On the same basis, the District Court sustained objections to the questions about false tax returns, impeding the administration of the I.R.S., and money laundering.

In conjunction with its rulings on the proposed questions, the District Court issued a Memorandum explaining its decision:

> The government's experts disagreed with most of the conclusions reached by defendant's experts .... [The Government's disputes] are with a narrower approach to Rule 702 and as to Rule 403 admissibility. However, there is little evidence that defendant's experts performed their evaluations improperly or irregularly -- or unscientifically. They may have been remiss in not looking into the economic operation of defendant's organization and ascertaining the enormity of its losses. Those matters could reflect on their assessment of defendant's condition as well as its relationship to his mens rea, both in clinical and legal terms .... [I]t appears that the government's initial objections raise issues as to weight and not admissibility.
>
> The relevance, scope, and form of the testimony of defendant's experts must also be decided. [*United States v. Pohlot*, 827 F.2d 889 (3d Cir.1987)] teaches that evidence bearing on mens rea is admissible because it relates to an essential element of guilt. The mental state at issue is "actual" mens rea -- which is not a matter of the individual's mental capacity but of the state of mind at the particular time in question. What is involved is a rule of evidence, not a defense.

Relevance, therefore, depends on the legal ingredients, or definition, of the pertinent mens rea. Where mens rea includes specific intent or knowledge, it goes beyond mere conscious awareness of conduct. The question is whether the expert evidence, if believed,*181 would support a legally acceptable theory of lack of mens rea.

* * *

The mental health expert may testify to the expert's examination and 1) diagnosis and to other clinical information, such as the patient's history and the patient's version of what occurred, in order to give the jury information from which to determine whether actual mens rea was present. The mental health expert may not testify to the expert's opinion or inference on that issue, directly or by hypothetical question.

A further limitation is that under F.R.E. 702 the expert's testimony must assist the fact-finder. Here, the expert testimony relating to defendant's alleged delusion or fantasy regarding "anonymous donors" may be relevant to the mens rea for mail fraud .... However, before such evidence may surmount the F.R.E. relevance and F.R.E. 702 hurdles, it must be shown that, given the actual facts and circumstances, it supports a legally acceptable theory of lack of mens rea. The expert must be prepared to testify to information that supplies at least a partial basis for, or leads to, the logical finding that the mens rea -- for example, in the case of mail fraud, the specific intent to defraud -- was or may not have been present. Merely conclusory or speculative testimony is not enough.

The same probative value principle pertains to the expert testimony regarding defendant's belief that he was acting as God's agent. His experts drew the conclusion that since he considered himself to be carrying out God's will, he could not have possessed the requisite mens rea for commission of the crimes charged. Regardless of their validity, the expert's opinions or inferences as to defendant's mental state -- in the legal sense -- are barred by F.R.E.704(b). However, the question remains as to the probative value of any expert testimony that defendant believed his actions were at God's behest. Motive is not an essential element of guilt and need not be proven by the government. The morality of one's conduct may be relevant to a legal insanity defense. But, by itself, moral rectitude, regardless of the supremacy of the authority for such approbation, will not negate mens rea. Here, too, it is necessary for defendant to show how God's influence or direction fits into a legally acceptable theory that he lacked the state of mind at issue.

* * *

As to each of the crimes charged in the present case, while the mens rea requirements vary, all of them involve some type of intentionally false representation. As a matter of law, no amount of honest belief that an enterprise will succeed -- or is worthwhile -- can justify false, baseless, or reckless assertions or promises.

* * *

In order to have probative value as to mens rea, defendant's expert testimony must relate to the

particular misrepresentations attributed to him in the indictment. If his clinical condition and symptomology can be logically connected to his subjective belief that his assertions were not false, baseless, or reckless visa-vis the truth, such evidence is admissible to show lack of mens rea. Otherwise, it is not -- despite a strongly held religious conviction, whether or not arising from mental disorder, that his conduct was morally upright and would be societally beneficial.

* * *

For a mental health expert's testimony to have probative value as to statutory willfulness, it must have some bearing, in factual terms, on the issue of whether there was a voluntary, intentional violation of a known legal duty. The generalized conclusion, without more, that defendant believed he was doing God's work is not sufficient to negate the mens rea of statutory willfulness. What it tends to prove -- the morality or goodness of defendant's conduct -- is not necessarily inconsistent with a guilty mens rea. It does not by itself tend to show that the alleged violation, here the filing of false tax returns, was not voluntary or intentional or was not a violation of a known legal duty.

Inasmuch as the rulings on relevance objections have been deferred, defendant will be given a further opportunity, within *182 the guidelines set forth in this memorandum, to develop the mental health theory of his case. It is not necessary for the mental health expert's testimony to provide the fact basis for defendant's theory or theories in

their entirety or even large part. But the testimony must show some Rule 401 or Rule 702 connection to the lack of actual mens rea for the particular crime charged in the indictment.

United States v. Bennett, 29 F.Supp.2d 236, 238-41 (E.D.Pa.1997) (Memorandum) (citations omitted).

B. Propriety of Pretrial Rulings Concerning Expert Testimony

Bennett argues the District Court erred in ruling his proffered psychiatric evidence was inadmissible under Federal Rule of Evidence 704(b), which forbids experts from stating an "opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto." Fed.R.Evid. 704(b). Bennett maintains the proffered questions did not call for such an opinion or inference, but sought admissible evidence of whether Bennett: (a) harbored the specific intent to defraud; (b) knew and believed that the tax returns and other information given to the IRS were false; (c) knew the money he handled represented the proceeds of criminal activity (as is required under the money laundering statute); or (d) harbored the specific intent to promote illegal activity.

[1][2] We review the District Court's rulings on the admissibility of expert testimony for abuse of discretion. See *United States v. McGlory*, 968 F.2d 309, 345 (3d Cir. 1992); *Habecker v. Copperloy Corp.*, 893 F.2d 49, 51 (3d Cir. 1990). We note the trial judge has broad discretion to admit or exclude expert testimony, based upon whether it is helpful to the trial of fact. *See* Fed.R.Evid. 702; 4 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 702.02[2] (Joseph M.

McLaughlin ed., 2d ed. 1997) ("The trial judge has broad discretion to admit or exclude expert testimony under the test of 'helpfulness' .... In determining the admissibility of expert evidence, the trial judge must also consider whether the general relevancy requirements of Rules 401-403 are met.").

Rule 704 provides:

Opinion on Ultimate Issue

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

Fed.R.Evid. 704. The accompanying advisory committee's note states:

The basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact. In order to render this approach fully effective and to allay any doubt on the subject, the so-called "ultimate issue "rule is specifically abolished by the instant rule.

* * *

The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to

> the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria.

Fed.R.Evid. 704 advisory committee's note.

[3][4] Rule 704 prohibits "testimony from which it necessarily follows, if the testimony is credited, that the defendant did or did not possess the requisite mens rea." *United States v. Morales*, 108 F.3d 1031, 1037 (9th*183 Cir. 1997). Therefore, expert testimony is admissible if it merely "support[s] an inference or conclusion that the defendant did or did not have the requisite mens rea, so long as the expert does not draw the ultimate inference or conclusion for the jury and the ultimate inference or conclusion does not necessarily follow from the testimony." *Id.* at 1038 (allowing expert testimony that a defendant charged with willfully making false entries in a union ledger had a weak grasp of bookkeeping principles, because to hold otherwise "would exclude an expert's opinion on any matter from which the factfinder might infer a defendant's mental state").[4]

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[4] See also *United States v. Levine*, 80 F.3d 129, 134 (5th Cir. 1996) (noting that a majority of circuits find that "hypothetical questions mirroring the fact patterns of the evidence in the trial case [violate Rule 704(b)] when the answering testimony contains a necessary inference as to whether the defendant did or did not have the mental

Nonetheless, "[c]ourts have interpreted Rule 704(b) to prohibit both the prosecution and the defense from inquiring of expert psychiatrists whether the defendant, at the time of the crime, was able to appreciate the wrongfulness or the nature and quality of his acts." *United States v. Brown*, 32 F.3d 236, 238 (7th Cir.1994); see also *United States v. West*, 962 F.2d 1243, 1246 (7th Cir. 1992) (holding that Rule 704 forbids psychiatric testimony as to whether defendant charged with bank robbery understood the wrongfulness of his act at the time of the offense).

[5] We believe the District Court properly excluded the questions asking whether Bennett's mental disorders (1) "precluded him from forming the intent to defraud"; (2) made it "highly unlikely that he could form

_____(continued)

state or condition constituting an element of the crime charged or of a defense thereto"); *United States v. Richard*, 969 F.2d 849, 854-55 (10th Cir. 1992) ("Rule 704(b) only prevents experts from expressly stating the final conclusion or inference as to a defendant's actual mental state. The rule does not prevent the expert from testifying to facts or opinions from which the jury could conclude or infer the defendant had the requisite mental state."); *United States v. Foster*, 939 F.2d 445, 454 (7th Cir.1991) (allowing expert testimony that "merely assisted the jury in coming to a conclusion as to [defendant's] mental state; it did not make that conclusion for them"); *United States v. Dunn*, 846 F.2d 761, 762 (D.C.Cir. 1988) ("It is only as to the last step in the inferential process -- a conclusion as to the defendant's mental state -- that Rule 704(b) commands the expert to be silent.").

the intent to defraud"; (3) made it "unlikely that he would have engaged in conduct designed to defraud"; (4) precluded him "from forming the specific intent to defraud individuals"; (5) made it "unlikely that he could defraud the individuals and entities"; (6) "affect[ed] his ability to knowingly and willfully submit false statements to the I.R.S."; and (7) made "it unlikely that he would knowingly and willfully submit false statements to the I.R.S." These questions go beyond merely assisting the jury, explaining the nature of Bennett's mental disease, or describing the typical effect of Bennett's disorders on his mental state. Instead, they require the expert witness to state expressly whether Bennett possessed the requisite intent to commit the crimes charged in the indictment. Accordingly, we find no abuse of discretion in the District Court's refusal to admit the questions.

In his argument to the contrary, Bennett relies principally on *United States v. Hayden*, 64 F.3d 126 (3d Cir.1995), *United States v.Theodoropoulos*, 866 F.2d 587 (3d Cir.1989), and *United States v. Pohlot*, 827F.2d 889 (3d Cir.1987), all of which allowed the introduction of expert testimony on the defendant's mental condition at the time of the offense. In all three cases, however, the proffered testimony was limited to a factual description of the defendant's mental capacity, without any opinion or inference as to whether the defendant had the mental state required for commission of the offense.

In *Hayden*, the defendant had been convicted of receiving a firearm while under a felony information, in violation of a statute punishing those who "willfully violate[]" its provisions. 18 U.S.C. § 924(a)(1)(D) (1988 & Supp. V 1993). While completing forms for the purchase of the firearm, the defendant had responded

"no" to a question asking whether he was "under indictment or information." *Id.* at 127. In fact, the defendant was under a criminal information for receiving stolen property, and he acknowledged having received a copy of the information in the mail. At trial, the District Court prevented *184 the defendant's expert witness from testifying the defendant had low intelligence and poor reading skills.

In reversing, we held such evidence was relevant to determine whether the defendant's failure to provide truthful information on the form was "willful," as required by the statute. See *id.* at 134 (holding that "the government must prove Hayden knew or deliberately disregarded the fact that he was under an information and that his purchase of a firearm was therefore unlawful" and "the excluded evidence had a direct bearing on willfulness"). Accordingly, we remanded for a new trial but specifically instructed that "[a]ny use of expert testimony on remand must, of course, comply with Federal Rule of Evidence 704(b)." *Id.* at 134 n. 13.

In *Theodoropoulos*, we assessed the testimony of an FBI crypt analyst who translated code words used in intercepted conversations and testified about his inferences of the roles played by the individual defendants in a drug trial.[5] We held this testimony did not "fall within the narrow range of opinions still prohibited under Rule 704 ....[because it consisted of] factual conclusions rather than opinions." *Theodoropoulos*, 866 F.2d at 591 (citing,

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[5] We note that *Theodoropoulos* was overruled on other grounds by *United States v. Price*, 76 F.3d 526 (3d Cir. 1996).

inter alia, *United States v. Brown*, 776 F.2d 397, 400-02 (2d Cir. 1985) (holding expert testimony that defendant was a "steerer" in a drug organization was admissible)).

Finally, in *Pohlot* we considered "what, if any, evidence of a criminal defendant's mental abnormality is admissible to prove the defendant's lack of specific intent to commit an offense, following the passage of the Insanity Defense Reform Act of 1984." *Pohlot*, 827 F.2d at 890.[6] The defendant had been charged with using interstate commerce facilities in a plot to murder his wife. At trial, his psychiatric expert testified at length about the defendant's emotional development, his history of abuse by his wife, and his supposed feeling that the murder plot was an elaborate fantasy. See *id.* at 892. But the expert did not express an opinion whether the defendant had the requisite intent to be guilty of the crime charged. We concluded the Insanity Defense Reform Act barred admission of evidence of mental abnormality to support a diminished capacity or

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[6] The Insanity Defense Reform Act of 1984 provides in part:

> (a) **Affirmative Defense.** -- It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality of the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

18 U.S.C.A. § 17 (West Supp.1998).

diminished responsibility defense, but did not bar admission of such evidence to negate an element of mens rea:

> [A]lthough Congress intended § 17(a) to prohibit the defenses of diminished responsibility and diminished capacity, Congress distinguished those defenses from the use of evidence of mental abnormality to negate specific intent or any other mens rea, which are elements of the offense. While the contours of the doctrines of diminished responsibility and diminished capacity are unclear, the defenses that Congress intended to preclude usually permit exoneration or mitigation of an offense because of a defendant's supposed psychiatric compulsion or inability or failure to engage in normal reflection; however, these matters do not strictly negate mens rea.
>
> Despite our disagreement with the government's broad contention [that the Act barred all evidence of mental abnormality from the jury's consideration of mens rea], we agree that the Congressional prohibition of diminished responsibility defenses requires courts to carefully scrutinize psychiatric defense theories bearing on mens rea. Psychiatrists are capable of supplying elastic descriptions of mental states that appear to but do not truly negate the legal requirements of mens rea. Presenting defense theories or psychiatric testimony to juries that do not truly negate mens rea may cause confusion about what the law requires.

*185 *Id.* at 890. Therefore, "[d]istrict courts should admit evidence of mental abnormality on the issue of mens rea only if when, if believed, it would support a legally

acceptable theory of lack of mens rea." *Id.* at 905-06.[7] We upheld Pohlot's conviction because even if the psychiatric testimony were credited, it did not negate a finding of specific intent. See *id.* at 906-07.

Unlike the defendants in Hayden, Theodoropoulos, and Pohlot, Bennett sought to introduce expert testimony expressly stating that he lacked the mental capacity to commit the charged crimes. All of the excluded questions asked the expert to state, in conclu-

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[7] Pohlot mentioned Rule 704(b), albeit briefly, in dicta:

> [T]he Senate Judiciary Committee wished to abolish only diminished responsibility and capacity defenses not to abolish the use of psychiatric evidence to disprove mens rea.
>
> A later portion of the Senate Report confirms this view of the Committee's intent. In addition to changing the insanity defense, the Insanity Defense Reform Act altered Federal Rule of Evidence 704 to prevent psychiatric experts from providing opinions on ultimate issues. The Report explained: "The Committee has fashioned its Rule 704 provision to reach all such ultimate issues, e.g., premeditation in a homicide case, or lack of predisposition in entrapment." Premeditation is, of course, an element of mens rea. If the Judiciary Committee had intended § 17(a) to prevent psychiatrists from testifying about mens rea at all, its report would almost certainly not have indicated its approval of psychiatric evidence on mens rea.

Id. at 898-99 (citations omitted).

sory terms, how Bennett's mental disorders affected his criminal culpability. That decision is exclusively within the province of the jury. We find no abuse of discretion in the District Court's decision to exclude the proposed testimony.

C. Sentencing Issues

Bennett maintains the District Court erred during sentencing in failing to make specific findings of fact and resolve disputed issues as required by federal Rule of Criminal Procedure 32(c)(1). That Rule provides:

> **(1) Sentencing Hearing.** At the sentencing hearing, the court must afford counsel for the defendant and for the Government an opportunity to comment on the probation officer's determinations and on other matters relating to the appropriate sentence, and must rule on any unresolved objections to the presentence report. The court may, in its discretion, permit the parties to introduce testimony or other evidence of the objections. For each matter controverted, the court must make either a finding on the allegation or determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing. A written record of these findings and determinations must be appended to any copy of the presentence report made available to the Bureau of Prisons.

Fed.R.Crim.P. 32(c)(1). The accompanying advisory committee note provides:

> Subdivision (c)(1) is not intended to require that resolution of objections and imposition of sentence occur at the same time or during the

same hearing.It requires only that the court rule on any objections before sentence is imposed .... The rule speaks in terms of the court's discretion, but the sentencing Guidelines specifically provide that the court must provide the parties with a reasonable opportunity to offer information concerning asentencing factor reasonably in dispute.

* * *

Subdivision (c)(1) (formerly subdivision (c)(3)(D)) indicates that the court need not resolve controverted matters which will "not be taken into account in,or will not affect, sentencing." [T]he words "will not affect" did not exist in the former provision but were added in the revision in recognition that there might be situations, due to overlaps in the sentencing ranges, where a controverted matter would not alter the sentence eve if the sentencing range were changed.[8]

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[8] See *United States v. Singh*, 923 F.2d 1039, 1044 (3d Cir.1991) ("Rule 32 requires the judge, as a predicate for sentencing, either to resolve all disputes as to facts recited in the presentence report, or to make clear that the matters in dispute will not be a factor in sentencing."); *United States v. Furst*, 918 F.2d 400, 408 (3d Cir.1990) ("[Rule 32] directs the District Court, as to each matter converted, either expressly to disclaim reliance upon the matter or to make a finding as to the allegation."); *United States v. Rosa*, 891 F.2d 1063, 1070 (3d Cir.1989) ("[T]he purpose of Rule 32 will not be

Fed.R.Crim.P. 32 advisory committee's note.

1. Consideration of the Sentencing Memorandum

[6] Initially, we must decide whether to consider the Sentencing Memorandum filed *186 by the District Court after Bennett had appealed his sentence.As noted, the District Court made oral findings of fact at the sentencing hearing and expressly adopted the findings of the Presentence Investigation report in its judgment order. The Sentencing Memorandum contains a more comprehensive explanation of the District Court's factual findings and conclusions of law with respect to the issues contested on this appeal. See *United States of America v. Bennett*, 9 F.Supp.2d 513 (E.D.Pa.1998) (Sentencing Memorandum). Although we do not condone late filing, we will nonetheless consider the Sentencing Memorandum.

Bennett argues consideration of the Sentencing Memorandum would violate our local Rules of Appellate Procedure and could unfairly prejudice his case. Local Rule of Appellate Procedure 3.1 provides, in part:

> **Notice To Trial Judge; Opinion In Support Of Order**
>
> At the time of the filing of a notice of appeal, the appellant shall mail a copy thereof by ordinary mail to the trial judge. Within 15 days thereafter,the trial judge may file and mail to the parties a written opinion or a written amplification of a prior written or oral recorded ruling or opinion.

_____(continued)

fulfilled unless the court either resolves the dispute or expressly disavows reliance on the disputed information.").

3d Cir. R. 3.1. Notably, the accompanying comments suggest a flexible approach is consistent with the spirit of the rule: "A District Court may properly prepare an opinion or memorandum explaining a decision after an appeal is taken. The rule is not intended to inhibit or discourage District Courts from preparing opinions as they presently do. To the contrary, the rule was designed to provide more flexibility." 3d Cir. R. 3.1 committee comments.

The District Court filed its Sentencing Memorandum long after the 15-day window of Local Rule 3.1 had expired.[9] Bennett does not ask that we strictly enforce the rule's 15-day limit, but proposes instead a bright-line rule forbidding consideration of any District Court opinion filed less than 30days before the due date for the appellant's brief. He advocates 30 days because "that is the shortest period of time under this Court's practice that an appellant is deemed to need to prepare the opening brief." (Appellant's Post-Argument Letter Br. at 4.) Thus, Bennett argues a 30-day rule would fulfill Local Rule 3.1's purpose of ensuring that appellants are not prejudiced by post-appeal clarifications of

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[9] After being sentenced in September 1997, Bennett filed a notice of appeal on October 2, 1997, and his brief to this Court on February 24, 1998. The government filed its brief on April 15, 1998 and Bennett filed a reply brief on May 21, 1998. Both parties based their arguments on the presentence report and the District Court's findings as reflected in the transcript of the sentencing hearing. Thereafter, on May 28, 1998, the District Court filed the Sentencing Memorandum.

rulings in response to the appellant's formulation of issues and the identity of the panel.

Although Bennett's argument carries some appeal, we decline to adopt a bright-line rule. Instead we will look to the nature of the supplemental memorandum and whether its consideration would prejudice the defendant. In this case, we believe the Sentencing Memorandum is a helpful amplification of the District Court's sentencing decisions and its consideration will not prejudice Bennett.Bennett concedes the District Court did not alter or clarify its rulings to address the arguments raised in his appellate brief or cater to the identity of the panel. Nor was Bennett prejudiced by a lack of opportunity to address the content of the Sentencing Memorandum, since we allowed both parties to submit supplemental briefs on whether we should accept the Sentencing Memorandum and to respond to its content. Thus we fail to see how consideration of the sentencing Memorandum could prejudice Bennett.

Finally, we note that even in the absence of the Sentencing Memorandum,we believe *187 the District Court's expiicit adoption of the factual findings in the presentence report, along with its own factual findings and legal conclusions at the sentencing hearing, were sufficient. Accordingly, we will consider the Sentencing Memorandum as an amplification of the District Court's sentencing decisions.

2. The Sentencing Memorandum

The Sentencing Memorandum focuses largely on the enhancements applied. On the calculation of the "amount of loss" for purposes of U.S.S.G. § 2F1.1(b)-(1)(S), the Sentencing Memorandum explains:

> The government's evidence demonstrated that the offense conduct was commenced in 1988-89 with check-kites that permitted defendant to pay off old loans with monies received from new investors .... [T]he New Concepts program was begun as a check-kite/"Ponzi" scheme to cover cash shortages in defendant's then companies, and the scheme grew, in the form of a pyramid, as the base of investors widened. There was no collateral or other safety net to prevent the ultimate -- predictable -- catastrophic loss. Moreover, the huge pre-sentence restitution to the victims resulted from the considerable efforts of many individuals other than defendant. The loss was calculated to be in excess of $100 million based on the undisputed evidence as to the amount owed investors when New Era collapsed. Given the alternatives, that figure best approximated the extent of loss attributable to the New Concepts matching program. Because the amount was greater than $80 million, the upper limit of the highest Guideline's bracket for amount of loss, 18 levels, were added.

Bennett, 9 F.Supp.2d at 519-20 (citations omitted).

Next, the District Court explained its decision to enhance Bennett's base offense level by two levels because of Bennett's misrepresentation that he was acting on behalf of a charitable organization:

> In the opinion of New Era's tax counsel it was "important and appropriate"that the New Concepts program be disclosed on New Era's applications for tax-exempt status. Nevertheless, there was no reference to it on either New Era's

application for federal 501(c)(3) exemption or the application for Pennsylvania charitable organization. Nor were inter-connected relationships between defendant's for-profit and not-for-profit entities disclosed. In October, 1994 an I.R.S. agent was sent to New Era to investigate the existence of a suspected Ponzi-like scheme. At that audit, defendant himself represented that there was no matching program. At sentencing, defendant admitted having concealed the matching program from the I.R.S.

Defendant's claim that he was unaware of New Era's financial operations is incomprehensible and not credible. The staff consisted of a handful of individuals all of whom were responsible to defendant and supervised by him. When called as government witnesses, their testimony portrayed him to be a micro-manager of the programmatic and financial activities of New Era as well as of the other entities that were subject to his control. He was an active and forceful CEO who created and organized his companies in his own image. He put together the programs, laid out all policies and directed their implementation, and selected personnel. He retained and conferred with attorneys and accountants. He solicited and met with representatives of potential investors -- and made or approved all major corporate decisions.

At defendant's direction, New Era misrepresented or withheld information essential to its tax exempt status. As related in unrebutted testimony, defendant falsely conveyed to his own staff and to corporate counsel, as well as the public,

> that there was a board of directors. However, there were no directors other than defendant, although from time to time he talked about appointing them. As one of his attorneys testified, an I.R.S.requirement for tax-exempt status is the existence of a genuine board of directors. Another conceded that although defendant submitted to the I.R.S. a list of board members, in actuality none of the documents concerning the board "matched up" -- causing the attorney to be *188 concerned. Ironically, in a lecture series conducted by him, defendant admonished charitable organizations about the importance of a board of directors and of proper record-keeping for I.R.S. purposes. Credible evidence was received at sentencing that to satisfy the 1994 I.R.S. audit, defendant had dictated and submitted fictitious minutes of board meetings for 1992 and 1993.
>
> Defendant's misrepresentations allowed New Era to present itself as a legitimate, tax-exempt foundation and facilitated the success of its illegal operation.

Id. 9 F.Supp.2d at 520-21 (citations omitted).

The Sentencing Memorandum also describes how Bennett "affected a financial institution" and derived more than one million dollars in gross receipts,resulting in an enhancement under U.S.S.G. § 2F1.1(b)(6)(B):

> The offense "affected a financial institution" in that defendant maintained personal and New Era accounts at several financial institutions, including Founder's Bank, the National Bank of the Main Line, and Prudential Securities.

> Defendant's "gross receipts" took two forms. One consisted of payments directly from New Era--money that came almost entirely from the New Concepts matching program. The other involved expenditures made for the benefit of defendant or his family.
>
> Evidence showed that during the operation of New Era, there were transfers in excess of $4 million to defendant's personal accounts or to those of his for profit companies. In the words of a government auditor, $4,208,637 was transferred from New Era to "entities in which 100 percent interest is to John G. Bennett, Jr." This total corresponded with the report of defendant's accountant less $800,000 credit for pre-collapse returns of previously transferred assets. Accepting defendant's figures, the amount still exceeds $3 million.
>
> As to the expenditures that benefited defendant or his family, it was proven that more than $2 million went directly to defendant's personal expenses and investments, including the purchase of a house, travel, loans, an expensive car, and transfers of money through for-profit company accounts.
>
> As computed by the government auditor, the total of salary paid defendant, together with payments to his family members, Main Line Travel Agency, Merrill Lynch Investments, a Lexus dealership, personal credit card accounts, and for baseball tickets came to $2,449,960.

Id. 9 F.Supp.2d at 521 (citations omitted).

The District Court also applied a four-level enhancement for Bennett's role in the offense. The Sentencing Memorandum explains this decision, characterizing Bennett's role as an organizer or leader of a criminal activity that was"otherwise extensive" within the meaning of U.S.S.G. § 3B1.1(a).

> In this action, there appears to have been just one other "criminal participant," an accountant. The application of the enhancement rests on the"otherwise extensive" prong.
>
> Andrew Cunningham, one of the outside accountants, pleaded guilty in this court to fraud in relation to his accounting work for New Era. In 1994, Cunningham became suspicious and asked defendant about several matters, including payments from New Era to defendant's for-profit consulting firm (Bennett Group International); fabricated minutes of board meetings presented to the I.R.S.; and lack of documentation to support the matching program. Some time after these inquiries, Cunningham informed defendant that he himself was in financial difficulty and needed about $50,000. Defendant promptly agreed to give him that amount and said: "I guess this means there won't be any more hard questions." According to his testimony at defendant's sentencing, Cunningham felt that he had been "bought." From then on, when asked critical questions about New Era's activities, he falsified his answers.Cunningham became a criminal participant working at defendant's direction.
>
> However, defendant also used a number of ostensibly innocent individuals to facilitate the

> operation of the matching program, rendering the activity "otherwise extensive." [Seven New Era employees *189 worked under his direction] ... Each performed a job that related and contributed to the overall scheme.
>
> As an illustration -- defendant's assistant, acting at his behest, did not give the monthly "payment schedules" to New Era's lawyers and accountants who had asked for them. She also withheld the list of New Era's board members. Defendant utilized the services of several respected outside attorneys and accountants. Their work products, which gave defendant's companies the imprimatur of legality and reliability, reflected the carefully delimited information supplied to them by defendant. Moreover, he specifically directed prudential Securities employees who handled investor inquiries not to divulge the non-segregated nature of these so-called "escrow" accounts.
>
> Since none of these individuals would appear to have acted with knowledge of New Era's illegal activities, they do not bear "equal responsibility" with defendant for his conduct. Contrary to defendant's view, the enhancement was not based on defendant's position as president and sole director of New Era. Instead, the evidence supports the application of the enhancement because defendant led or directed one criminal participant and at least 13 innocent individuals to assist in the commission of the crimes for which he was indicted.

Id. 9 F.Supp.2d at 522-23 (citations omitted).

The District Court further explained its decision to enhance Bennett's offense level for abusing "a position of trust" in a way that "significantly facilitated" the commission of a crime. U.S.S.G. § 3B1.3. The Sentencing Memorandum states:

> As regards the nonprofit organizations and individuals who invested or donated money to be "matched," New Era and defendant occupied positions of trust as fiduciaries. Additionally, as its lone director, defendant had a fiduciary relationship with New Era. When defendant caused significant misrepresentations to be made in order to secure and maintain New Era's "tax exempt" status, defendant violated his fiduciary duties both to the public and to New Era.
>
> Next, as the government proved, defendant used these positions of trust to enable the perpetration of crimes. While defendant may have been impelled by his intense hopes to "Save the World," he not only was aware that monies were entrusted to New Era, but he also took fraudulent steps to develop and encourage that trust. Defendant's letter to prospective individual investors of January 1995 enclosed an informational manual about New Concepts and referred investors and donors to New Era's form 990 and state due-diligence registration. This is just one instance in which defendant knowingly disseminated material misrepresentations that were undeniably false.
>
> To say that investors were greedy and, therefore, took their chances is but a half, self-serving truth. As a Guidelines Commentary aptly observes: "Taking advantage of a victim's self-interest does

not mitigate the seriousness of fraudulent conduct." Similarly, the argument that others, such as Prudential Securities, the accountant, Andrew Cunningham, and counsel helped lead defendant down the garden path, must also be flatly rejected. That reputable professionals, at his request, assisted him in carrying out these offenses hardly diminishes his role in them. If anything, the more cogent conclusion is to the contrary.

As repletely shown by the evidence, defendant knowingly, purposefully, and repeatedly misrepresented the nature and characteristics of the matching program in order to market it and effectuate large scale participation. At its outset, he claimed that there was an "anonymous benefactor" whose giving made the program feasible. Later, as he admitted, New Era distributed to organizations across the United States and, eventually, in England, prospectus-type literature asserting that the "original" benefactor was "extremely pleased" with the progress of the program.

Acting at defendant's sole direction, the Foundation constantly borrowed against and invaded funds that investors had deposited to be held, doubled and returned -- *190 not encumbered or spent. Defendant assured potential investors that their money would be held for them in accounts at Prudential Securities. Nevertheless, as testified to by Prudential employees, all money received was put into a single "command account," which was under defendant's total control and in which funds were merely designated "F.B.O."--"for the benefit

> of"--the investing organization. Defendant *explained to investors that they money would have* to be held in "escrow" for set periods of time because of the "anonymous benefactors" purported instructions. But as defendant well knew, all the funds received by New Era were commingled and were transferred,at his discretion, to cover shortfalls and to make other improper payments.These various dealings constituted fact-specific knowing abuses of trust.

Bennett, 9 F.Supp.2d at 523-24 (citations omitted).

Finally, the District Court reiterated its refusal to grant a two-level downward adjustment for acceptance of responsibility:

> Here, although conceding his knowledge of the occurrence of many of the transactions forming the fact basis of the charges and accepting personally responsibility for them, defendant disavowed having any criminal intent. He denied knowledge of account balances or of checks signed by him, of tax forms that he signed, and of giving his accountants a fabricated list of board members to be submitted to the I.R.S. He disclaimed any wrongdoing. Even if the "anonymous benefactors" had actually existed, that position is untenable,given defendant's numerous admitted misrepresentations of material facts and his unauthorized use of investor's monies. He cannot be said to have clearly demonstrated a recognition and affirmative acceptance of personal responsibility for his criminal conduct, as required by § 3E1.1. Instead,he demonstrated a non-recognition and non-acceptance of personal responsibility.

Id. 9 F.Supp.2d at 524 (citations omitted).

D. Resolution of Sentencing Issues

[7] Bennett argues the District Court erred in imposing: (1) a two-level increase in the offense level for Bennett's misrepresentation of acting on behalf of a charity; (2) a four-level increase for deriving more than $1million from a fraud offense that affected a financial institution; (3) a four-level increase for Bennett's role leadership role in the offense; (4) a two-level increase for his abuse of a position of trust; and (5) no reduction in the offense level for Bennett's acceptance of responsibility. When reviewing the imposition of a sentence under the federal sentencing guidelines, "the District Court's findings of facts are measured by the clearly erroneous test, but our review of the legal component of its conclusion is plenary." *United States v. Hillstrom*, 988 F.2d 448, 450 (3d Cir.1993); see also *United States v. Bush*, 56 F.3d 536, 537-38 (3d Cir.1995).

1. Misrepresentation of Acting on Behalf of a Charity

[8] As noted, the District Court imposed a two-level enhancement under U.S.S.G. § 2F1.1(b)(3)(A) for Bennett's misrepresentation of acting on behalf of a charity. Bennett argues the District Court failed to make proper factual findings in response to his objections that (1) he never falsely represented his authority to act as an agent or employee of the New Era organizations; (2) the New Era organizations were bona fide; and (3) there is insufficient evidence to prove the New Era organizations were frauds from their inception or that Bennett intentionally provided false information to or deceived either the I.R.S. or other government agencies.

We believe the District Court's fact-finding supports application of the adjustment. The presentence report found that Bennett secured a favorable I.R.S. rating for New Era by submitting fraudulent documentation that failed to reveal the New Concepts Program, he enticed participants to provide funds with false statements that anonymous donors would match their donations, and he used New Era's charitable image to divert funds to private businesses. The District Court adopted these findings and determined that Bennett's conduct caused a loss of over $100 million. The court also recited the presentence *191 report's determination that Bennett diverted many of these funds to his personal use, in direct violation of his promise to hold the money in escrow until it was matched by the alleged anonymous donor. Bennett did all of this under the pretense of running a legitimate charitable organization.

[9] Bennett also argues that as a matter of law, the adjustment applies only when a defendant falsely claims to be soliciting on behalf of a genuine charity with which the defendant has no connection, solicits on behalf of a fictitious charity, or uses a position as the actual representative of a genuine charitable organization to embezzle money. According to Bennett, the adjustment does not apply here because the Foundation for New Era Philanthropy was a genuine "charitable organization" and Bennett actually acted on its behalf at all times.

[10] We disagree with this narrow interpretation of the enhancement. The guideline provides that if the offense involved "misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency ... increase by 2 levels."U.S.S.G. § 2F1.1(b)(3)(A). The application note states:

> Examples of conduct to which this factor applies would include a group of defendants who solicit contributions to a non-existent famine relief organization by mail, a defendant who diverts donations for a religiously affiliated school by telephone solicitations to church members in which the defendant falsely claims to be a fund raiser for the school, or a defendant who poses as a federal collection agent in order to collect a delinquent student loan.

U.S.S.G. § 2F1.1 cmt. (n.4). This list of examples is illustrative, not exhaustive. See *United States v. Ferrera*, 107 F.3d 537, 541 (7th Cir.1997) ("[T]he commentators could not have intended these examples to be exhaustive, and as a practical matter, these examples could not be exhaustive,as the devious mind would easily escape that limited net.") (citation omitted). But see *United States v. Frazier*, 53 F.3d 1105, 1113 (10th Cir.1995) (noting that the hypotheticals "demonstrate that the purview of the guideline is narrower than that which may be discerned from a literal reading of the guideline").

[11] The background commentary to the fraud guideline instructs:

> This guideline is designed to apply to a wide variety of fraud cases .... Use of false pretenses involving charitable causes and government agencies enhances the sentences of defendants who take advantage of victims' trust in government or law enforcement agencies or their generosity and charitable motives. Taking advantage of a victim's self interest does not mitigate the seriousness of fraudulent conduct. However, defendants who exploit victims'

> charitable impulses or trust in government create particular social harm.

U.S.S.G. § 2F1.1 cmt. (backg'd).[10] Furthermore, "that the victims may not have wholeheartedly believed [defendant's] representations and sought independent verification does not mitigate the seriousness of [defendant's]conduct. Rather, the focus of our inquiry must be on the defendant's motivation for making the prohibited representation." *Ferrera*, 107 F.3d at 541.

Assuming the Foundation for New Era Philanthropy constituted a genuine charitable organization in some respects, it is clear Bennett used his position there to ensnare donors with falsehoods designed to generate contributions. He exploited his victims' altruism to reap personal, pecuniary gain. We find no authority for the proposition that the enhancement applies only if the "charitable" organization is fraudulent from its inception and in every facet of its operations. Nor does it matter that many of Bennett's victims acted at least partially out of self interest. See *id.* Regardless of their motivation in giving money to New Era, donors had a right to expect that their contributions would be *192 used in the manner that Bennett had promised.[11]

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[10] See *Stinson v. United States*, 508 U.S. 36, 38, 113 S.Ct. 1913, 123 L.Ed.2d 598 (1993) ("[C]ommentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.").

[11] See, *e.g.*, *United States v. Smith*, 133 F.3d 737, 741 (10th Cir. 1997) (approving enhancement where defendant

In response, Bennett relies largely on the Tenth Circuit's decision in *United States v. Frazier*, cited above. Frazier was the president of a non-profit corporation that provided technical and social services to Native Americans. He was indicted for, inter alia, misusing government funds and making false statements to a government agency. The Tenth Circuit held that an enhancement for misrepresentation of acting on behalf of a charity was not warranted, because the enhancement applies only when a defendant exploits victims' generosity and charitable motives by misrepresenting one's authority. Frazier therefore limits application of U.S.S.G. § 2F1.1(b)(3)(A) to defendants who falsely represent they have authority to act on behalf of a charitable, religious, educational, or political organization. See *id.* at 1114 n. 7 (citing *United States v. Starr*, 986 F.2d 281, 282-83 (8th Cir.1993)).

The facts of this case are quite different. The defendant in Frazier "did not affirmatively solicit contri-

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obtained contributions as telephone solicitor for a bogus organization supposedly devoted to helping children stay off drugs where the organization actually retained collected funds); *Ferrera*, 107 F.3d at 541 (affirming enhancement where defendant issued falsified promissory notes purportedly guaranteed by the Mexican government and falsely claimed to be a prominent figure in the Mexican military and government); *United States v. Marcum*, 16 F.3d 599, 603 (4th Cir.1994) (upholding enhancement for defendant who skimmed proceeds from bingo games conducted on behalf of a charitable organization).

butions from the public, but rather [misapplied government funds]," "did not exploit the 'generosity' and 'charitable motives' of his victim," and "did not solicit funds the purpose of which was, at least in part, to serve his own personal interest." *Frazier*, 53 F.3d at 1114; see also *Smith*, 133 F.3d at 744 (noting Frazier "used grant funds for unauthorized purposes, but did not 'appeal to the generosity and charitable or trusting impulses of his victim'") (citation omitted); *Ferrera*, 107 F.3d at 542 & n. 4 (distinguishing *Frazier* on the same grounds). In contrast, Bennett actively solicited contributions from individuals and organizations, exploiting their charitable impulses to extract donations that were eventually funneled to his for-profit businesses and personal use. Surely these donors would not have contributed the funds had they known the true nature of New Era: namely, that it was an organization premised on falsehoods and serving as a vehicle for Bennett's personal gain.

We conclude the District Court properly applied a two-level enhancement for Bennett's misrepresentation that he acted on behalf of a charity.

2. Affecting a Financial Institution

[12] The District Court applied a four-level enhancement because Bennett derived more than $1 million in gross receipts from an offense that affected a financial institution. Bennett argues the District Court failed to make specific factual findings to support application of this enhancement.

U.S.S.G. § 2F1.1(b)(6)(B) provides: "If the offense ... affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense, increase by four levels. If the resulting offense level is less than level 24, increase to level 24."

The accompanying application note explains "gross receipts from the offense" generally means"that the gross receipts to the defendant individually, rather than to all participants, exceeded $1,000,000. 'Gross receipts from the offense' includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense." U.S.S.G. § 2F1.1 cmt.(n.16); see *United States v. Kohli,* 110 F.3d 1475, 1477 (9th Cir.1997) ("Application note 16 confirms the broad sweep of this guideline.").

[13][14] The guideline requires only (1) that the offense "affected a financial institution," and (2) that the defendant "derived more than $1,000,000 from the offense." U.S.S.G. § 2F1.1(b)(6)(B). It applies "even if the defendant receives the million dollars in an indirect manner." *United States v. Monus*, 128 F.3d 376, 397 (6th Cir.1997); see also *Kohli*, 110 F.3d at 1477 ("The critical factor *193 in the application of this enhancement is that it turns on the culpability of the individual defendant."). The offense need only "affect" a financial institution to qualify for the adjustment; it does not have to jeopardize the soundness of the institution. See *United States v. Wilson*, 41 F.3d 399, 401 (8th Cir.1994) (finding "no qualification indicating that Congress sought to punish such conduct only when the safety and soundness of a financial institution was jeopardized").

[15] We believe Bennett's offense met these criteria. Both the presentence report and the District Court expressly found that Bennett personally derived more than $1 million from his criminal conduct. This finding was fully supported by the evidence. Bennett's forensic accountant and the government's expert agreed that Bennett transferred $4,280,637 to businesses in

which he possessed a 100 percent interest. Reducing this amount by the $800,000 that Bennett returned after being caught, the gross receipts still far exceed $1 million. Bennett's expert nevertheless concluded that Bennett did not receive all of these funds "individually" because he subsequently transferred much of the money to consultants and others who did work for New Era. But it is irrelevant how Bennett spent the money after he obtained it. See *United States v. Wong*, 3 F.3d 667, 668 (3d Cir.1993) (holding that "'gross receipts from the offense' includes all property which is obtained either directly or indirectly as a result of the offense"). The District Court did not err in finding Bennett individually derived more than $1 million from his offense.

We also find support for the District Court's conclusion that the offense affected several financial institutions, most directly Prudential Securities. As the presentence report and the Sentencing Memorandum note, Bennett obtained a $50 million loan for New Era from Prudential and used his account there to facilitate the offenses. He then defrauded investors by telling them their funds were deposited in Prudential "quasi-escrow" accounts. In the aftermath, the bankruptcy trustee sued Prudential for over $150 million. Prudential ultimately agreed to pay $18 million to settle litigation resulting from the collapse of the New Era organizations and suffered negative publicity that harmed its reputation.[12]

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[12] See, *e.g.*, *Monus*, 128 F.3d at 397-98 (finding corporate officer who concealed losses and falsified corporate financial records, some of which were submitted to

The District Court expressly adopted these findings from the presentence report. It also expressly found at the sentencing hearing that Bennett individually derived more than $1 million from offenses affecting a financial institution. We believe these findings were more than adequate to support application of the enhancement.

3. Leadership Role in the Offense

[16] According to Bennett, the District Court made only conclusory findings to support its decision to enhance his base offense level for being an organizer or leader of a criminal activity under U.S.S.G. § 3B1.1(a). Bennett further claims the District Court failed to identify individuals Bennett organized, supervised, and managed, or the offenses in which these individuals participated, and failed to determine whether Bennett's accountant Andrew Cunningham was a culpable participant in the criminal activity.

[17] The Sentencing Guidelines provide: "If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels." If the defendant was a "manager or supervisor (but not an

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financial institutions, "affected a financial institution"); *United States v. Schinnell*, 80 F.3d 1064, 1070 (5th Cir.1996) (upholding enhancement where defendant improperly withdrew funds from her employer's bank account, because "direct harm to the banks involved was certainly reasonably foreseeable" and "the banks [were] realistically exposed to substantial potential liability as the result of [defendant's] fraud").

organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels." U.S.S.G. § 3B1.1(b). Thus, the sentencing court should enhance the more culpable offenders' levels "so long as there were five or more participants or so long as the criminal *194 activity was 'otherwise extensive.'" *United States v. Katora*, 981 F.2d 1398, 1405 (3d Cir.1992).

In the Sentencing Memorandum, the District Court explains there was only one other "participant" (accountant Andrew Cunningham), but the enhancement was appropriate because the criminal activity was "otherwise extensive." See *United States v. Bennett*, 9 F.Supp.2d 513, 521-22 (E.D.Pa.1998). We believe this holding was correct. The Sentencing Guidelines define a "participant" as a "person who is criminally responsible for the commission of the offense, but need not have been convicted." U.S.S.G. § 3B1.1 cmt. (n.1). Only Cunningham, who pleaded guilty to charges related to Bennett's offenses,appears to fit this description. However, the Guidelines also instruct that in assessing whether an organization is "otherwise extensive," "all persons involved during the course of the entire offense are to be considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive." U.S.S.G. § 3B1.1, cmt.(n.3).[13]

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[13] The Sentencing Commission describes the purpose of the enhancement as follows:

> This section provides a range of adjustments to increase the offense level based upon the size of a

In addition to enlisting Cunningham's services, Bennett actively used his New Era staff to perpetrate extensive fraud. The Sentencing Memorandum identifies by name seven employees who, unwittingly and at Bennett's direction, contributed to Bennett's scheme by withholding requested documents and information from investors. See *Bennett*, 9 F.Supp.2d at 523-24. It also notes that Bennett hired several attorneys and accountants to prepare reports based on false information that

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> criminal organization (*i.e.*, the number of participants in the offense) and the degree to which the defendant was responsible for committing the offense. This adjustment is included primarily because of concerns about relative responsibility. However, it is also likely that persons who exercise a supervisory or managerial role in the commission of an offense tend to profit more from it and present a greater danger to the public and/or are more likely to recidivate. The Commission's intent is that this adjustment should increase with both the size of the organization and the degree of the defendant's responsibility.
>
> In relatively small criminal enterprises that are otherwise to be considered extensive in scope or in planning or preparation, the distinction between organization and leadership, and that of management or supervision, is of less significance than in larger enterprises that tend to have clearly delineated divisions of responsibility.

U.S.S.G. § 3B1.1 cmt. (backg'd).

Bennett had given them, and then used their imprimatur of propriety to pass off New Era as a legitimate charitable organization. Additionally, Bennett instructed employees at Prudential Securities not to reveal that New Era funds on deposit there were not held in "escrow or quasi-escrow" accounts, as Bennett had told investors. In all, the District Court counted "at least 13 innocent individuals" whom Bennett used to assist him in the commission of his crimes. *Id.* 9 F.Supp.2d at 523.

All of these findings are amply supported by the presentence report and by the District Court's findings at the sentencing hearing. Accordingly, we believe the District Court adequately articulated the factual bases for concluding that Bennett was the leader of an "otherwise extensive" criminal enterprise.[14]

4. Abuse of a Position of Trust

[18] Bennett argues the District Court failed to make the necessary findings to support its determination

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[14] See also *United States v. D'Andrea*, 107 F.3d 949, 957 (1st Cir.1997) (holding that the determination of whether a criminal enterprise is "extensive" under U.S.S.G. § 3B1.1 derives from the "'totality of the circumstances,'" including not only the number of participants, but also the "'width, breadth, scope, complexity, and duration of the scheme'"); *United States v. Dietz*, 950 F.2d 50, 53 (1st Cir.1991) (noting when sentencing court finds defendant's scheme involved one other criminal participant "the court is free to consider the use of unwitting outsiders in determining if a criminal enterprise is 'extensive' within the contemplation of section 3B1.1").

that Bennett should receive a two-level upward adjustment for abusing a "position of trust" under U.S.S.G. § 3B1.3. According to Bennett, the enhancement is unwarranted because he held no "insider" position facilitating the offense or causing the victims to rely on his integrity. *195 Bennett also argues the enhancement is designed to apply to those who misuse their own positions of trust or special skills, and therefore should not be based on Bennett's use of fiduciaries such as lawyers, accountants, and stock brokers to assist the New Era organizations.

The Sentencing Guidelines provide for a two-level upward adjustment if the defendant "abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense ...." U.S.S.G. § 3B1.3. The application notes state:

> "Public or private trust" refers to a position of public or private trust characterized by professional or managerial discretion (*i.e.*, substantial discretionary judgment that is ordinarily given considerable deference). Persons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily nondiscretionary in nature. For this enhancement to apply, the position of public or private trust must have contributed in some significant way to facilitating the commission or concealment of the offense (*e.g.*, by making the detection of the offense or the defendant's responsibility for the offense more difficult). This adjustment, for example, would apply in the case of an embezzlement of a client's funds by an

> attorney serving as a guardian, a bank executive's fraudulent loan scheme, or the criminal sexual abuse of a patient by a physician under the guise of an examination. This adjustment does not apply in the case of an embezzlement or theft by an ordinary bank teller or hotel clerk because such positions are not characterized by the above-described factors.

U.S.S.G. § 3B1.3 cmt. (nn.1, 2). We have identified several factors relevant to determining what constitutes a "position of trust" for purposes of U.S.S.G. § 3B1.3:

> (1) whether the position allows the defendant to commit a difficult-to-detect wrong; (2) the degree of authority which the position vests in defendant vis-a-vis the object of the wrongful act; and (3) whether there has been reliance on the integrity of the person occupying the position. These factors should be considered in light of the guiding rationale of the section--to punish"insiders" who abuse their position rather than those who take advantage of an available opportunity.

United States v. Pardo, 25 F.3d 1187, 1192 (3d Cir.1994) (finding the defendant did not occupy a position of trust merely because he was the friend of the bank manager in a check-kiting and loan fraud scheme).[15]

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[15] See also *United States v. Turner*, 102 F.3d 1350, 1360 (4th Cir.1996) (finding mine owners and operators who falsified forms abused positions of trust because they exercised managerial discretion, employees trusted them and deferred to their judgment regarding mine safety, and the public trusted them to follow mine safety laws);

Evaluating these criteria, we find the enhancement for abuse of a position of trust was fully justified. Bennett's position as president and sole director of the New Era organizations greatly reduced the probability that the fraudulent offenses would be detected. His absolute control over the organizations enabled him to conceal his crimes from detection for approximately six years. In particular, Bennett's authority allowed him to disseminate falsehoods about trust agreements and anonymous benefactors, misrepresent that he received no compensation for his charitable efforts, create a phony board of directors made up of prominent individuals, deceive investors that funds deposited with New Era organizations were held in escrow or quasi-escrow accounts, and provide false information to the I.R.S. and investors.

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United States v. Sokolow, 91 F.3d 396, 413 (3d Cir.1996) (upholding enhancement because president and owner of company "was able to commit difficult-to-detect wrongs, as he had sole control over [the company's] accounts without oversight or supervision"); *United States v. Lilly*, 37 F.3d 1222, 1227 (7th Cir.1994) (holding that a position of trust is characterized by "'access or authority over valuable things'") (citations omitted); *Marcum*, 16 F.3d at 603-04 (finding enhancement appropriate because "[a]s president, Marcum was responsible for running the games and completing and mailing the financial returns; without this position of trust, he would not have the had the opportunity to commit the crime"); *United States v. Queen*, 4 F.3d 925, 929 (10th Cir.1993) ("[T]he question of whether an individual occupies a position of trust should be addressed from the perspective of the victim.").

*196 In all of these undertakings, it was Bennett's position of trust that cloaked him with the requisite authority to deceive. Because New Era had no genuine board of directors, Bennett acted without supervision and exercised unlimited managerial discretion over the organizations and their staffs. Additionally, he had unchecked authority to make withdrawals and deposits from company accounts, to invade the "command" account in which all donations were held, and to transfer funds from one organization to another.

Furthermore, it is clear the victims relied on Bennett's integrity when making donations. They believed, based on his representations, that their money would be held in low-risk accounts to be matched by anonymous donors and ultimately used for charitable purposes. It was this fiduciary position that Bennett occupied -- not his use of additional fiduciaries such as lawyers and accountants -- that caused the District Court to find Bennett held a position of trust relative to his victims. We believe the District Court properly increased Bennett's offense level for abuse of a position of trust.

5. Acceptance of Responsibility

[19][20] Bennett asserts the District Court failed to make adequate findings of fact to explain its denial of a two-level downward adjustment for acceptance of responsibility under U.S.S.G. § 3E1.1. He claims his acceptance of responsibility is demonstrated by his guilty plea, his decision to cooperate prior to the initiation of a criminal investigation with the Bankruptcy Trustee and Bankruptcy Court, and his surrender of a large portion of his personal assets. He further argues that as a matter of law, there is no categorical rule against granting an

acceptance-of-responsibility adjustment when the defendant pleads nolo contendere rather than guilty.[16]

[21][22] U.S.S.G. § 3E1.1(a) provides: "If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels." In determining whether a defendant qualifies for a reduction under this provision, the District Court is not required to limit its analysis solely to whether the defendant entered a guilty plea:

> Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under § 1B1.3 (Relevant Conduct) ... will constitute significant evidence of acceptance of responsibility for the purposes of subsection

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[16] A plea of nolo contendere, "like the plea of guilty ... is an admission of guilt for the purposes of the case." *Hudson v. United States*, 272 U.S. 451, 455 (1926). More specifically, it is the

> [t]ype of plea which may be entered with leave of court to a criminal complaint or indictment by which the defendant does not admit or deny the charges, though a fine or sentence may be imposed pursuant to it .... The principal difference between a plea of guilty and a plea of nolo contendere is that the latter may not be used against the defendant in a civil action based upon the same acts.

Black's Law Dictionary 1048 (6th ed. 1990).

(a). However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility. A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.

U.S.S.G. § 3E1.1 cmt. (nn.1, 3); see *United States v. Singh*, 923 F.2d1039, 1043 (3d Cir.1991) ("[A] plea of guilty is not dispositive as to the defendant's acceptance of responsibility."). Moreover, the District Court's decision whether to grant the adjustment is entitled to "great deference" on review because "[t]he sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility." U.S.S.G. § 3E1.1 cmt. (n.5); see also *United States v. Cianscewski*, 894 F.2d 74, 83 (3d Cir.1990) (holding the District Court's determination that defendant did not accept responsibility will be reversed only if "clearly erroneous"). The defendant bears the burden of proving that he is entitled to the downward adjustment. See, *e.g.*, *United States v. Bermea*, 30 F.3d 1539, 1577 (5th Cir.1994); *United States v. Barry*, 961 F.2d 260, 266 (D.C.Cir.1992).

*197 We find the District Court did not err in declining to reduce Bennett's offense level for acceptance of responsibility. The presentence report recommended against such an adjustment because Bennett continued "to deny factual guilt and criminal intent for his actions." In the press release announcing his decision to plead nolo contendere, Bennett made a point of stating he did not admit to the government's version of the facts.[17]

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[17] In a press release dated March 26, 1997, Bennett explained his reasons for entering the nolo contendere

More importantly, at the sentencing hearing Bennett

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plea:

> By entering this nolo contendere plea, Mr. Bennett accepts responsibility for the consequences of his conduct in operating the Foundation for New Era Philanthropy ("New Era"). Mr. Bennett's decision is based, in part, on the Court's pretrial ruling which limited his ability to present psychiatric evidence on the issue of his intent. For this reason, Mr. Bennett's plea is conditional, thereby enabling him to appeal the court's ruling ....
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> * * * * * *
>
> After careful consideration of all of his options, including proceeding to trial or plea bargaining for a lesser sentence, Mr. Bennett chose to enter his nolo contendere plea. A plea of nolo contendere has historically been viewed "not as an express admission of guilt but as a consent by the defendant that he may be punished if he were guilty and a prayer for leniency." A nolo contendere plea was particularly appropriate in this case since, by his plea, Mr. Bennett does not admit or adopt as true the government's version of the facts, insofar as those facts relate in any way to the issue of his intent to commit the crimes alleged in the indictment.

On April 16, 1997, Bennett distributed a letter to "those affected by the collapse of the Foundation for New Era Philanthropy" in which he stated that "I realize that by going to trial I could have defended myself against the

continued to deny culpability:

> Though I know if I were to state my guilt in regard to certain facts of this case, my sentence would be less, I just can't do that. I never intended to defraud or hurt anyone. The benefactors were real to me at that time and I never bribed Mr. Cunningham .... The words he stated I said to him after helping him are completely alien to my nature.

Bennett also denied that he transferred New Era funds to his personal accounts and for-profit businesses, created a fictitious board of directors, or fabricated minutes of their "meetings." Bennett's testimony provided a sufficient basis for the District Court to conclude Bennett had not accepted responsibility for his actions. See, *e.g.*,

_____(continued)

allegations, many of which are untrue." In the letter, Bennett states he did not want to put his family, friends, staff, former associates, and charities through the experience of a trial. He also reveals:

> I could not plead guilty and plea bargain for a lesser sentence. All the counts charge me with the intent to defraud. By plea bargaining to those charges, I would be lying before my God to get a lesser sentence because I would have to admit an intent to defraud. There was never any intent, never a preconceived scheme, never a thought of devising a way to defraud anyone. I am responsible for my actions and I am prepared to accept responsibility for them. But I can never plead guilty to nor admit to the intent to defraud which I did not possess.

United States v. Muhammad, 146F.3d 161, 168 (3d Cir. 1998) (upholding denial of adjustment for acceptance of responsibility where defendant offered no "genuine show of contrition"); *United States v. Veksler*, 62 F.3d 544, 551 (3d Cir.1995) (upholding denial where defendant did not admit to the crimes charged in the indictment).

[23] We also reject Bennett's argument that he is entitled to the adjustment because his nolo contendere plea is equivalent to a guilty plea. Even if the pleas are equivalent, the Guidelines make clear that a guilty plea does not carry with it an automatic entitlement to credit for acceptance of responsibility. *See* U.S.S.G. § 3E1.1 cmt. (nn.1, 3). Nor does Bennett's cooperation with the Bankruptcy Trustee and other government agencies automatically qualify him for the adjustment. These actions may constitute evidence of acceptance of responsibility, but the sentencing court was free to consider other evidence that is inconsistent with acceptance of responsibility,such as Bennett's repeated denials of culpability. Here, the District Court weighed the evidence and determined Bennett had not truly accepted responsibility for his crimes. Supported by the facts set forth in the presentence report (which the District Court expressly adopted) and by Bennett's own testimony at the sentencing hearing, the District Court was in the best position to *198 ascertain the genuineness of Bennett's contrition. We decline to disturb its finding.

III. CONCLUSION

We hold the District Court did not abuse its discretion in excluding proposed questions for Bennett's expert witness under Federal Rule of Evidence 704(b). The questions called for responses stating expressly whether Bennett possessed the requisite mental state

constituting elements of the crimes charged. We also hold the District Court made sufficient findings of fact as required by Federal Rule of Criminal Procedure 32 to resolve disputed points at sentencing relating to Bennett's misrepresentation of acting on behalf of a charity, his deriving more than $1 million from a fraud offense that affected a financial institution, his aggravating role in the offense, his abuse of a position of trust, and his acceptance of responsibility. Similarly, we approve the District Court's application of the Sentencing Guidelines on these issues.

Accordingly, we will affirm the judgment of sentence imposed by the District Court.

APPENDIX B

9 F.Supp.2d 513
A.F.T.R.2d 98-6252

UNITED STATES of America
v.
John G. BENNETT, Jr.

No. Crim. A. 96-503.
United States District Court,
E.D. Pennsylvania.
May 27, 1998.

*516 Richard Goldberg, U.S. Attorney, Philadelphia, PA, for U.S.
Odell Guyton, Miller, Alfano and Raspanti, P.C., Philadelphia, PA, for John G.Bennett, Jr.

MEMORANDUM

LUDWIG, District Judge.

On September 22, 1997 defendant John G. Bennett, Jr. was sentenced to 144 months of custody, followed by three years of supervised release. On March 26, 1997 he had entered a conditional plea[1] of nolo

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[1] He reserved the right to appeal pretrial rulings as to the admissibility of mental health evidence. Order, March 18, 1997. The conditional nature of the plea was colloquyed at the time of its entry and again at sentencing. Transcript, March 26, 1997 at 36; September 22, 1997 at 9, 20-21. See *infra* at 518-19.

contendere to an 82-count indictment. The charges were fraud and related offenses arising from his conduct as president and sole director of the not-for-profit corporation known as the Foundation of New Era Philanthropy. Revised PSR ¶ 1.[2]

The specific charges were one count of bank fraud, 18 U.S.C. § 1344; 16 counts of mail fraud, 18 U.S.C. § 1341; 18 counts of wire fraud, 18 U.S.C. § 1343; one count of false statements, 18 U.S.C. § 1001; three counts of filing false tax returns, 26 U.S.C. § 7206; one count of impeding the administration of revenue laws, 26 U.S.C. § 7212; 15 counts of money laundering, 18 U.S.C. § 1957; and 27 counts of money laundering to promote unlawful activity, 18 U.S.C. § 1956(a)(1)(A)(I). *Id.*

After an evidentiary hearing, the total offense level was fixed at 38, which,taken with a Criminal History Category of I, produced a Guidelines range of 235 to 293 months. A downward departure of 91 months measured from the bottom of the Guidelines range was granted.

Defendant's request for a downward adjustment for acceptance of responsibility was denied. Certain downward departure requests also were rejected. This memorandum amplifies findings on which offense level and downward departure rulings were based.

*517 I--Background

From 1989 to 1995, defendant was the president and sole director of the Foundation for New Era Philan-

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[2] On September 16, 1997, at the outset of the sentencing hearing, defendant agreed to a redacted Presentence Report that incorporated his "revised objections."

thropy,[3] one of seven entities[4] that he controlled during this period of time. Revised PSR ¶ 7; gov't organizational chart. Within New Era, there were a number of "programs," one of which was called "New Concepts in Philanthropy."[5] Tr. Sept. 16 at 15. The operating principle of "New Concepts" involved "matching funds." Initially, individuals were solicited to become "beneficiary donors" whose contributions would be doubled within a set period of time and then given to the charity of the "donor's" choice. Revised PSR ¶¶ 16, 25, 26.

Later, defendant advised[6] religious groups,

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[3] New Era was given tax-exempt status by the Commonwealth of Pennsylvania and the Internal Revenue Service. The information submitted was false in several material respects. Revised PSR ¶¶ 74-78, 80, 82, 85, 86. *See infra*, II-A.3.

[4] These were: The Foundation for New Era Philanthropy; New Era Philanthropy International Trust; The Bennett Group, International; Human Service Systems, Inc.; Multimedia Communicators; The Evelyn M. Bennett Foundation; and The Ameche Foundation. *See* Government's Chart of Companies/Foundation Operated by John Bennett. In defendant's view, each entity was part of his all-encompassing goal of charitable giving, which he called "Save the World for the Glory of God." Tr. Sept. 16 at 128-130.

[5] "New Concepts" -- the matching program -- referred to both as "program" and "fund." Tr. Sept. 16 at 166.

[6] New Concepts was begun with individual donors.

schools, museums, and other not-for-profit organizations that he could double their money usually in a period of six months.[7] His explanation was that there were extremely wealthy philanthropists who wanted him to distribute their charitable giving anonymously.[8] *See* gov. exh. 149. They also desired to "leverage" their contributions by requiring the money to be matched -- which would encourage organizations to do fund raising on their own. The interest earned on the funds deposited with New Era would pay for its scholarship grants to deserving students, and New Era's overhead would be defrayed by the alleged "anonymous benefactors." Revised PSR ¶ 53.[9] However, in May of 1995, when the matching funds program collapsed, defendant admitted that there were no "anonymous benefactors." Organizations that had doubled their money had done so almost entirely out of funds sent in by other would-be "investors."

_____(continued)

Revised PSR ¶ 25. On January 1, 1994, on defendant's solicitation, groups began to participate. *Id.* at 30.

[7] On occasion, the holding periods were three, nine or 10 months. Revised PSR ¶ 25.

[8] Defendant called these philanthropists "anonymous benefactors." Revised PSR ¶¶ 25, 28.

[9] As it turned out, only a small proportion of the funds received was placed at interest. Most were used as security for loans, and New Era's operating expenses were paid from the deposits themselves.

In its relatively short life span, the magnitude of the enterprise became enormous -- the largest charity fraud in history. At the end, there was a shortfall in excess of $100 million in monies paid in by "investors." New Era had received and churned over $350 million. Substantial amounts went to defendant's other corporations and also to defendant and members of his family.

More particularly, the fact basis for the charges of bank fraud (count 1), mail or wire fraud (counts 2-35), and filing false statements charge (count 36) was as follows. In inducing prospective investors[10] to believe that New Era would double their money, defendant represented that the "benefactors" had "guaranteed" their contributions with "trust agreements" that were kept in his sole possession. Revised PSR ¶ 28. The benefactors -- eventually, there were as many as nine, he said -- were known only to him, and he had given them his pledge not to reveal their identities. He also informed investors that their monies would be securely held in escrow accounts in a well-known financial *518 institution. *Id.* ¶ 36. All of these representations were false.

During the heyday of New Era, defendant repeatedly gave assurances to investors that the program was continuing to be operated with "trust agreements" and escrow accounts. *Id.* ¶¶ 57-61. He also went to consider-

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[10] Defendant referred to the individual investors as "beneficiary donors" or "anonymous donors." Revised PSR ¶ 26 ("the individuals who provided money to New Era for the purpose of having their contributions doubled by the alleged anonymous donors and sent to other charities by New Era"); defendant's statement at note 1.

able lengths to deter investors from finding out the true nature of the money doubling scheme -- *i.e.*, that it was other investors' money -- or funds borrowed against investors' deposits, tr. Sept. 16 at 22 -- and not that of anonymous philanthropists. He restricted the flow of information that could tip off the public or an inquisitive investor.[11] While some contributions were received from genuine donors, 97 percent of the funds received in the matching program came from investors. Tr. Sept. 17 at 98.

Defendant also misrepresented the composition of New Era's board of directors,both to investors and to the I.R.S., and submitted false information to the I.R.S. concerning the program and its operation. *Id.* ¶¶ 74-86. This conduct, in part, was the basis of the charges of false statement, filing false tax returns, and obstruction of the administration of the I.R.S. (counts 36-40). Given his personal control of New Era and his intimate management of its small staff, his defense that he did not knowingly make misrepresentations and false statements or was unaware of them was not worthy of belief.

Transfers of funds from New Era to defendant's other entities were the gravamen of the money laundering charges (counts 41-55). *Id.* ¶¶ 87-102.[12] The

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[11] By limiting disclosures by New Era staff, tr. Sept. 19 at 5-6; employees of the financial depository, tr. Sept. 18 at 98; and accountants, tr. Sept. 19 at 52. *See infra* at II-B.1.

[12] Defendant admitted transferring monies between organizations to cover shortfalls. Tr. Sept. 16 at 128.

charges of money laundering to promote unlawful activity (counts 56-82) consisted of the use of mail and wire fraud proceeds to promote the ongoing New Concepts fraud. *Id.* ¶¶ 103-113.

Defendant's plea of nolo contendere was entered after rulings were made on the admissibility of certain mental health evidence. See Pretrial Rulings entered March 17 and Memorandum of March 18, 1997. Those rulings precluded the introduction of testimony from mental health experts as to ultimate opinions on defendant's lack of mens rea. F.R.E. 704(b). It also outlined the evidentiary issues, utilizing *United States v. Pohlot*, 827 F.2d 889 (3d Cir.1987), *cert. denied*, 484 U.S. 1011, 108 S.Ct. 710, 98 L.Ed.2d 660 (1988),[13] and deferred decision on the government's relevance objections so as to give defendant "a further opportunity, within the guidelines set forth in this memorandum, to develop the mental health theory of his case." Memorandum, March 18, 1997, at 13. It described the potential admissibility of mental health evidence as follows: "In order to have probative value as to mens rea, defendant's expert testimony must relate to the particular misrepresentations attributed to him in the indictment [footnote omitted]. If his clinical condition and symptomology can be logically connected to his subjective belief that his assertions were not false, baseless, or reckless vis-a-vis

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[13] Initially, defendant asserted and later withdrew the defense of legal insanity. A court-appointed forensic psychiatrist found him competent to stand trial. Tr. March 26, 1997 at 6 (entry of nolo contendere plea). He and his counsel did not contest his competency. *Id.* at 5.

the truth, such evidence is admissible to show lack of mens rea." *Id.* at 11. Thereafter, defendant did not come forward with any additional proffer or request for further pretrial rulings.

II Sentencing Guidelines

A. Specific Offense Characteristics

1. Amount of loss: 18 levels were added to the undisputed base level of six for the fraud group because of the amount of the loss. U.S.S.G. § 2F1.1(b)(1)(S). The adjustment was in dispute. The government's position was that the amount of the loss should equal either the amount owed to victims at the time of the collapse of New Era ($133 million) less cash on hand ($30 million), a net of $103 million, or the total amount of the investors'(victims') payments ($354 million). Government's proposed findings ¶ 29; gov.exh. 53-55.

*519 [1] Defendant maintained that the amount of the loss should not exceed $21 million, largely because of the restitution of $334 million accomplished by the U.S. Bankruptcy Trustee[14] -- which included sizable sums returned by investors that had doubled their money. Government's statement of material facts with defendant's objections at ¶ 128. A $21 million loss would have increased the base offense level by four levels instead of 18. U.S.S.G. § 2F1.1(b)(1)(E).[15]

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[14] Judge Arlin Adams.

[15] Defendant's theory of loss mistakenly conflated the effect of presentence restitution with the measurement of the seriousness, or magnitude, of the crime, which is intended to be a function of the base offense level. Presentence restitution is a mitigating factor to be

[2][3][4] As to a check-kite or bank fraud scheme, loss ordinarily should be calculated at the time when the fraud is detected -- not at time of sentencing. *United States v. Shaffer*, 35 F.3d 110, 111 (3d Cir.1994). Under the Guidelines, loss in a fraud scheme arises from the impact on the victim, which is not necessarily related to defendant's gain.[16] See *United States v.Wolfe*, 71 F.3d

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considered once the entirety of the crime has been assessed, and extraordinary restitution may result in a downward departure. *See infra* at III-B.

[16] Defendant contended that because he had no intent to cause such a loss, *United States v. Kopp*, 951 F.2d 521, 523 (3d Cir.1991) should apply. There, where a defendant fraudulently procured a secured bank loan, the amount of the loss was calculated as the bank's "actual loss, substituting intended or probable loss if either amount was higher and determinable." *Id.* at 523. Unlike theft, a defendant in a fraud action may not intend to deprive the victim of the value of the misappropriated funds permanently. *Id.* at 529. An example is a defendant who commits fraud in order to obtain a contract albeit intending to perform it. *Id.*

Under *Kopp*, defendant would have had the amount of loss fixed at $21 million, the "actual loss" of the victims at the time of sentencing. However, implicit in *Kopp*'s analysis is that defendant gave the victim -- a bank -- collateral for the fraudulently procured loan, "an obligation that eventually forced him to forfeit the collateral to the bank." *Id.* at 529. In the matching funds program, the investors' losses were not collateralized.

611, 617 (6th Cir.1995). A defendant's claimed lack of intent to cause any loss also is not determinative: "A wrongdoer should [not] completely escape a sentence enhancement if his scheme involved a substantial risk of loss merely because, under his own rosy scenario, no loss was intended." *United States v. Monaco*, 23 F.3d 793, 799 n. 10 (3d Cir.1994).

As *Shaffer* emphasized, in a check-kite scheme, there is no collateral security to redress monies taken from victims. 35 F.3d at 114. The same principle pertains to New Era's "matching funds" program. A lack of collateral usually means a substantial risk of loss. This approach comports with the policy behind the Sentencing Guidelines -- *i.e.* to "limit the wait-and-see approach to calculating actual loss [at sentencing] to secured loans because with unsecured loans, like those which sometimes result when check kiting schemes are detected, any recovery is entirely speculative." *Id.* at 115.

[5] Here, the government's evidence demonstrated that the offense conduct was commenced in 1988-89 with check-kites that permitted defendant to pay off old loans with monies received from new investors. Tr. Sept. 16 at 17-18. As F.B.I. Special Agent Cosgriff testified, the New Concepts program was begun as a check-kite/"Ponzi" scheme to cover cash shortages in defendant's then companies, and the scheme grew, in the form of a pyramid, as the base of investors widened. *Id.* at 19. There was no collateral or other safety net to prevent the ultimate -- predictable -- catastrophic loss. Moreover, the huge pre-sentence restitution to the victims resulted from the considerable efforts of many

individuals other than defendant.[17] The loss was calculated to be in excess of $100 million based on the undisputed evidence as to the amount owed investors when New Era collapsed. *Id.* at 52; gov. exh. 91. Given the alternatives, that figure best approximated the extent of loss attributable to the New Concepts matching program. Because the amount was greater than $80 million, the upper limit of the highest Guidelines *520 bracket for amount of loss, 18 levels were added. U.S.S.G. § 2F1.1(b)(1)(S).

[6] 2. More than minimal planning: Increase of two levels for more than minimal planning -- not in dispute. Gov't statement ¶¶ 128-129; U.S.S.G. § 2F1.1(b)(2)(A). The conduct at issue lasted over a period of six years and involved a complex and recurrent pattern of activity. See *United States v. Marcum*, 16 F.3d 599, 603 (4th Cir.1994), *cert. denied*, 513 U.S. 845, 115 S.Ct. 137, 130 L.Ed.2d 79 (1994) ("The comments to the guidelines deem 'more than minimal planning' to be present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune").

[7] 3. Misrepresentation of defendant acting on behalf of a charity: Increase of two levels -- disputed. U.S.S.G. § 2F1.1(b)(3)(A). Defendant asserts that he never "misrepresented" his authority on behalf of New

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[17] See *In re Foundation for New Era Philanthropy Litigation*, 175 F.R.D. 202 (E.D.Pa.1997) (approving multi-district class action settlement); *Museum of American Jewish History v. John G. Bennett, Jr.*, No. 95-3003, 1995 W.L. 334320 (E.D.Pa. June 2, 1995).

Era and that New Era was a "bona fide organization ... which carried out its charitable grant-making function as represented." Defendant's proposed findings at ¶¶ 151-152.

The following facts support the application of the enhancement. In the opinion of New Era's tax counsel it was "important and appropriate" that the New Concepts program be disclosed on New Era's applications for tax-exempt status. Tr. Sept. 18 at 134. Nevertheless, there was no reference to it on either New Era's application for federal 501(c)(3) exemption or the application for Pennsylvania charitable organization. Gov. exhs. 59, 68, 69, 70, 71, 113.[18] Nor were inter-connected relationships between defendant's for-profit and not-for-profit entities disclosed. Tr. Sept. 18 at 134. In October, 1994 an I.R.S. agent was sent to New Era to investigate the existence of a suspected Ponzi-like scheme. At that audit, defendant himself represented that there was no matching program. Tr. Sept. 19 at 88. At sentencing, defendant admitted having concealed the matching program from the I.R.S. Tr. Sept. 17 at 106-107.

Defendant's claim that he was unaware of New Era's financial operations is incomprehensible and not

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[18] New Era tax counsel also noted that the matching program was not listed in the Purpose Clause of the New Era's Articles of Incorporation. Tr. Sept. 18 at 139; gov. exh. 70. This irregularity was important because a matching program soliciting other non-profit organizations would raise different tax law issues from one soliciting individuals. Tr. Sept. 18 at 116-117, 142.

credible.[19] The staff consisted of a handful of individuals all of whom were responsible to defendant and supervised by him. When called as government witnesses, their testimony portrayed him to be a micro-manager of the programmatic and financial activities of New Era as well as of the other entities that were subject to his control. See tr. Sept. 19 at 17. He was an active and forceful CEO who created and organized his companies in his own image. Tr. Sept. 16 at 129-140. He put together the programs, laid out all policies and directed their implementation, and selected personnel. He retained and conferred with attorneys and accountants. He solicited and met with representatives of potential investors--and made or approved all major corporate decisions. See, *e.g.*, trs. Sept. 17 at 73-75, 98-99, 101, 107, 120; Sept. 16 at 161.

At defendant's direction, New Era misrepresented or withheld information essential to its tax-exempt status. *See infra* II-B.1. As related in unrebutted testimony, defendant falsely conveyed to his own staff and to corporate counsel, as well as the public, that there was a board of directors. However, there were no directors other than defendant, although from time to time he talked about appointing them. Trs. Sept. 17 at 106-110; Sept. 16 at 18-19; gov. exh. 137. As one of his attorneys testified, an I.R.S.requirement for tax-exempt status is the exis-

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[19] This was the gist of defendant's testimony, and it also was the post-collapse explanation given by him in a video cassette presentation that was sent to his supporters and to New Era investors. *E.g.*, tr. Sept. 17 at 8, 39, 80-85, 93-95, 98-99; gov. exh. 212.

tence of a genuine board of directors. Tr. Sept. 18 at 120. Another conceded that although defendant submitted to the I.R.S. a list of board members, in actuality none of the documents concerning the board *521 "matched up" -- causing the attorney to be concerned. *Id.* at 138-139. Ironically, in a lecture series conducted by him, defendant admonished charitable organizations about the importance of aboard of directors and of proper record-keeping for I.R.S. purposes. *See* gov. exh. 211 (1991 videotape of instructional speech to charitable organizations, marked "Bell Institutes"). Credible evidence was received at sentencing that to satisfy the 1994 I.R.S. audit, defendant had dictated and submitted fictitious minutes of board meetings for 1992 and 1993. Revised PSR ¶¶ 75-76; tr. Sept. 17 at 142-146; gov. exh. 112.

Defendant's misrepresentations allowed New Era to present itself as a legitimate, tax-exempt foundation and facilitated the success of its illegal operation.[20] The government, therefore, met its burden of proving that the enhancement was applicable.

[8] 4. The Offense Affected a Financial Institution and Defendant Derived More Than $1 Million in Gross Receipts: Increase of four levels -- disputed. U.S.S.G. § 2F1.1(b)(6)(B). Defendant contested having personally gained more than $1 million. Defendant's proposed

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[20] Defendant also frequently stated that he did not "take a dime" from New Era, implying that he did not want to be monetarily compensated for this charitable work. *E.g.*, tr. Sept. 18 at 168. But in reality he and his family received the direct benefit of nearly $2.5 million. *See infra* at II-A.4.

findings at ¶ 154. The credible evidence supported a finding that he obtained considerably more than that amount.

The offense "affected a financial institution" in that defendant maintained personal and New Era accounts at several financial institutions, including Founders' Bank, the National Bank of the Main Line, and Prudential Securities. See revised PSR ¶¶ 87-102.

Defendant's "gross receipts" took two forms. One consisted of payments directly from New Era -- money that came almost entirely from the New Concepts matching program. Tr. Sept. 18 at 104. The other involved expenditures made for the benefit of defendant or his family.

Evidence showed that during the operation of New Era, there were transfers in excess of $4 million to defendant's personal accounts or to those of his for-profit companies. Gov. exhs. 58, 91-94. In the words of a government auditor, $4,208,637 was transferred from New Era to "entities in which 100 percent interest is to John G. Bennett, Jr." Tr. Sept. 16 at 61.[21] This total corresponded with the report of defendant's accountant less $800,000 credit for pre-collapse returns of previously transferred assets. *Id.* at 63; deft. exh. 20. Accepting defendant's figures, the amount still exceeds $3 million.

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[21] Also, as reported by the auditor, aside from the entities under defendant's total control, an additional $3,466,981 was received by two for-profit companies in which defendant was an officer/shareholder (Human Service Systems and Multimedia Communicators). Tr. Sept. 16 at 61-62.

As to expenditures that benefitted defendant or his family, it was proven that more than $2 million went directly to defendant's personal expenses and investments, including the purchase of a house, travel, loans, an expensive car, and transfers of money through for-profit company accounts. Tr. Sept. 16 at 62-66; gov. exhs. 97-108.

As computed by the government auditor, the total of salary paid defendant,together with payments to his family members, Mainline Travel Agency, Merrill Lynch Investments, a Lexus dealership, personal credit card accounts, and for baseball tickets came to $2,449,960. Tr. Sept. 16 at 65.

B. Adjustments for Defendant's Role in the Offense

1. Aggravating role: Increase of four levels upon finding that defendant was an "organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive" -- disputed. U.S.S.G. § 3B1.1(a). According to its terms, there are two ways in which this enhancement could apply -- if defendant was the organizer or leader of a criminal activity that involved five or more "criminal participants," or if defendant was the organizer/leader of a criminal activity that was "otherwise extensive."

*522 [9][10] This enhancement does not apply to a solitary offender. See *United States v. Badaracco*, 954 F.2d 928, 934 (3d Cir.1992). Also, in order to be a "leader," defendant must supervise others, not simply be on equal footing with them. See *United States v. Katora*, 981 F.2d 1398,1405 (3d Cir.1992) (application of enhancement requires both "multiple participants and some differentiation in their relative culpabilities"). "Otherwise extensive" criminal activity is "based primarily

on the number of people involved, criminally and noncriminally, rather than on other possible indices of the extensiveness of the activity." See U.S.S.G. § 3B1.1, Application Note 3: "In assessing whether an organization is 'otherwise extensive,' all persons involved during the course of the entire offense are to be considered." See also *United States v. Carroella*, 105 F.3d 796, 802 (2d Cir.1997) (relying upon Application Note 3).

[11] In this action, there appears to have been just one other "criminal participant," an accountant. The application of the enhancement rests on the"otherwise extensive" prong.

Andrew Cunningham, one of the outside accountants, pleaded guilty in this court to fraud in relation to his accounting work for New Era.[22] Tr. Sept.19 at 44.[23] In 1994, Cunningham became suspicious and asked defendant about several matters, including payments from New Era to defendant's for-profit consulting firm (Bennett Group International), tr. Sept. 19 at 50-51; fabricated minutes of board meetings presented to the I.R.S., *id.* at 52-55; and lack of documentation to support

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[22] Cunningham was an associate with an accounting firm employed by defendant to perform bookkeeping and tax preparation for New Era and for BGI, one of defendant's for-profit companies. The firm also provided audit services for 1993 and 1994. Revised PSR at ¶ 9.

[23] See *United States v. Andrew Cunningham*, Cr. No. 96-507, guilty plea memorandum, October 17, 1996. Cunningham cooperated with the government, and was sentenced to 30 months of custody.

the matching program, tr. Sept. 19 at 55. Some time after these inquiries, Cunningham informed defendant that he himself was in financial difficulty and needed about $50,000. *Id.* at 56; gov. exhs. 203, 204. Defendant promptly agreed to give him that amount and said: "I guess this means there won't be any more hard questions." Tr. Sept.19 at 56. According to his testimony at defendant's sentencing, Cunningham felt that he had been "bought." *Id.* From then on, when asked critical questions about New Era's activities, he falsified his answers. *Id.* at 56-57. Cunningham became a criminal participant working at defendant's direction. See *Badaracco*, 954 F.2d at 934.

[12] However, defendant also used a number of ostensibly innocent individuals to facilitate the operation of the matching program, rendering the activity "otherwise extensive."[24] See *United States v. DeGovanni*, 104 F.3d 43, 46 (3d Cir.1997) (enhancement calls for determination that defendant had supervisory role in criminal activity, not merely a supervisory position within a group collectively participating in criminal activity). The following New Era employees worked under his direction: Mary Sinclair (Vice President for Administration), Tracy Ryan (Assistant to the President/Grants administrator), Bill Bennington (Executive Associate for U.S. Programs), Richard Ohman (Executive Associate for International Programs), Mark Staples (Program Officer), Kristin Bennett (Program Officer), and Donna

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[24] The involvement of nonculpable individuals is relevant not to defendant's role, but to the "extensiveness" of the criminal activity. See *Katora*, 981 F.2d at 1404-05.

Ebert (Program Manager/Institute Administrator). Tr. Sept. 17 at 73-75; "Foundation for New Era Philanthropy" organizational chart submitted by the government. Each performed a job that related and contributed to the overall scheme.

As an illustration -- defendant's assistant, acting at his behest, did not give the monthly "payment schedules"[25] to New Era's lawyers and accountants who had asked for them. Tr. Sept. 19 at 5-6. She also withheld the list of New Era's board members. *Id.* Defendant utilized the services of several respected *523 outside attorneys and accountants. *E.g.*, trs. Sept. 18 at 119; Sept. 19 at 46-47, 48-49, 52. Their work products, which gave defendant's companies the imprimatur of legality and reliability, reflected the carefully delimited information supplied to them by defendant. *See* tr. Sept. 18 at 120; gov. exh. 143. Moreover, he specifically directed Prudential Securities employees who handled investor inquiries not to divulge the non-segregated nature of these so-called "escrow" accounts. Trs. Sept. 18 at 98; Sept. 19 at 24-27.

Since none of these individuals would appear to have acted with knowledge of New Era's illegal activities, they do not bear "equal responsibility" with defendant for his conduct. See *Katora*, 981 F.2d at 1405 (application of enhancement requires both "multiple participants and some differentiation in their relative culpabilities"). Contrary to defendant's view, the enhancement was not based on defendant's position as president and sole

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[25] These tallied how much money New Era was expected to remit at the end of each month.

director of New Era. See *DeGovanni*, 104 F.3d at 46 (requirement of supervisory role in criminal activity). Instead, the evidence supports the application of the enhancement because defendant led or directed one criminal participant and at least 13 innocent individuals to assist in the commission of the crimes for which he was indicted.

[13][14] 2. Abuse of position of trust -- Increase of two levels -- disputed. U.S.S.G. § 3B1.3. Our Court of Appeals has held that this enhancement applies when a defendant occupies a position of trust and uses that position in a way that significantly facilitates the commission of the crime. *United States v. Craddock*, 993 F.2d 338, 340 (3d Cir.1993).

As regards the nonprofit organizations and individuals who invested or donated money to be "matched," New Era and defendant occupied positions of trust as fiduciaries. Additionally, as its lone director, defendant had a fiduciary relationship with New Era. When defendant caused significant misrepresentations to be made in order to secure and maintain New Era's "tax-exempt" status, defendant violated his fiduciary duties both to the public and to New Era. *See* discussion *supra* at II-A.3.

Next, as the government proved, defendant used these positions of trust to enable the perpetration of the crimes. While defendant may have been impelled by his intense hopes to "Save the World," he not only was aware that monies were entrusted to New Era, but he also took fraudulent steps to develop and encourage that trust. Defendant's letter to prospective individual investors of January, 1995 enclosed an informational manual about New Concepts and referred investors and donors to New

Era's Form 990 and state due-diligence registration. Gov. exh. 13. This is just one instance in which defendant knowingly disseminated material representations that were undeniably false.

To say that investors were greedy and, therefore, took their chances, tr. Sept. 22 at 17, is but a half, self-serving truth. As a Guidelines Commentary aptly observes: "Taking advantage of a victim's self-interest does not mitigate the seriousness of fraudulent conduct." Similarly, the argument that others, such as Prudential Securities, the accountant, Andrew Cunningham, and counsel helped lead defendant down the garden path, *id.*, must also be flatly rejected. That reputable professionals, at his request, assisted him in carrying out these offenses hardly diminishes his role in them. If anything, the more cogent conclusion is to the contrary.

As repeatedly shown by the evidence, defendant knowingly, purposefully, and repeatedly misrepresented the nature and characteristics of the matching program in order to market it and effectuate large scale participation. At its outset, he claimed that there was an "anonymous benefactor" whose giving made the program feasible. Tr. Sept. 17 at 102-104. Later, as he admitted, New Era distributed to organizations across the United States and, eventually, in England, prospectus-type literature asserting that the "original" benefactor was "extremely pleased" with the progress of the program. *Id.* at 104-105; gov't exh. 149 (New Concepts informational binder distributed to "non-profit organization candidate[s]").

Acting at defendant's sole direction, the Foundation constantly borrowed against and invaded funds that investors had deposited to *524 be held, doubled and

returned -- not encumbered or spent. Defendant assured potential investors that their money would be held for them in accounts at Prudential Securities. Tr. Sept. 17 at 122-123. Nevertheless, as testified to by Prudential employees, all money received was put into a single "command account," which was under defendant's total control and in which funds were merely designated "F.B.O." -- "for the benefit of" -- the investing organization. Trs. Sept. 18 at 98-99, Sept. 19 at 24, 28-29. Defendant explained to investors that the money would have to be held "in escrow" for set periods of time because of the "anonymous benefactors'" purported instructions. Tr.Sept. 17 at 124; gov. exhs. 13, 149. But as defendant well knew, all the funds received by New Era were commingled and were transferred, at his discretion, to cover shortfalls and to make other improper payments.[26] Trs. Sept. 16 at 128, Sept. 17 at 127-128. These various dealings constituted fact-specific knowing abuses of trust.

[15][16] 3. Adjustment for Acceptance of Responsibility -- Denied. Defendant claimed that he was entitled to a reduction of two levels for acceptance of responsibility under U.S.S.G. § 3E1.1. Defendant's proposed findings at ¶¶162-169. It is a defendant's burden to prove the application of the reduction. See *United States v. McDowell*, 888 F.2d 285, 291 (3d Cir.1989). To do so, a defendant must "clearly demonstrate acceptance of responsibility for his offense."

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[26] One of his attorneys warned defendant not to commingle finances between his non-profit and for-profit companies. Tr. Sept. 18 at 130.

§ 3E1.1. Comment 1(a) to § 3E1.1 states that it is relevant whether defendant "truthfully admit[s] the conduct comprising of the offense(s) of conviction." A nolo plea, in itself, or for that matter a guilty plea, will not "categorically bar" reduction for acceptance of responsibility. See *United States v. Fields*, 39 F.3d 439, 446 (3d Cir.1994).

[17] Here, although conceding his knowledge of the occurrence of many of the transactions forming the fact basis of the charges and accepting personal responsibility for them, defendant disavowed having any criminal intent. *See* revised PSR at ¶ 118; tr. Sept. 17 at 72. He denied knowledge of account balances or of checks signed by him, tr. Sept. 17 at 83, 96, 98-99, of tax forms that he signed, *id.* at 106-108, 137, 139, 140, and of giving his accountants a fabricated list of board members to be submitted to the I.R.S., *id.* at 142. He disclaimed any wrongdoing. *See* gov. exh. 1. Even if the "anonymous benefactors" had actually existed, that position is untenable, given defendant's numerous admitted misrepresentations of material facts and his unauthorized use of investors' monies. See tr. Sept. 17 at 103, 121. He cannot be said to have clearly demonstrated a recognition and affirmative acceptance of personal responsibility for his criminal conduct, as required by § 3E1.1. Instead, he demonstrated a non-recognition and non-acceptance of personal responsibility.

III Downward Departures

A. Downward Departures -- Rejected

[18][19] Three of defendant's requests for downward departures were rejected. The first was "Age" -- U.S.S.G. § 5H1.1. Under the Sentencing Guidelines Policy Commentary, age is not ordinarily relevant either

as an offender characteristic or as a basis for a downward departure. It is a discouraged factor. Policy Statement, § 5H1.1. A factor is "discouraged"when it has already been considered in the collation of previous sentences used to formulate the Guidelines prescribed ranges. See *Koon v. United States*, 518 U.S. 81, 95, 116 S.Ct. 2035, 2045, 135 L.Ed.2d 392 (1996) ("Discouraged factors are those 'not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range'"). Here, defendant's age was 60, which did not warrant a downward departure.

[20] The second was "Family Ties and Responsibilities, and Community Ties" -- § 5H1.6. This factor also is "not ordinarily relevant in determining what a sentence should be outside the guidelines range." Policy Statement, § 5H1.6. Here, at the time of sentencing, defendant had been married *525 for 36 years. Tr. Sept. 18 at 15. The evidence was that despite a difficult childhood as the son of an alcoholic father, defendant graduated from high school and college while working several jobs to help support his mother and three siblings. Tr. Sept. 16 at 102-106. He and his wife had two daughters -- both of whom are married. Tr. Sept. 18 at 16. Both have helped support their parents since the collapse of New Era. *Id.* at 18. Defendant's wife became employed part-time. *Id.* at 28.

Additionally, there was evidence as to defendant's community ties. Before he established New Era in 1989, defendant had worked in drug counseling and prevention programs from local to national levels; had created an organization to assist non-profits obtain funding; and had done financial consulting work for a group called "Teen Challenge." Tr. Sept. 16 at 114-117, 119, 121. Defendant

also testified to his deep religious faith and to his long-time involvement in religious groups and activities. *Id.* at 111-113. He stated that all of his organizations came under an umbrella philosophy that he described as "Change the World for the Glory of God."[27] *Id.* at 129-130.

Crediting these family and community ties -- while they may have significantly weighed in defendant's favor, they were not so extraordinary as to sustain a downward departure on the basis of this discouraged factor. To the extent that the community activities constituted public service and good works, they were considered as part of the downward departure granted under § 5H1.11. *See infra* ¶ III-B.

[21] The third rejected request pertained to defendant's "Employment Record"under § 5H1.5, another "discouraged factor." His employment record -- which essentially tracks his community activity -- was not "extraordinary" in the Guidelines-departure sense.

None of these requests, individually or added together, or with other circumstances, appeared to warrant the exercise of departure discretion.

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[27] According to defendant, each organization he founded shared the four elements of his "Change the World" philosophy: first, that God have a significant influence on the activity, which defendant called a "Kingdom Focus"; second, that the activity "meet people's needs"; third, that the activity be directed to "eliminate pain and suffering"; and fourth, that the activity help "make others' dreams come true." Tr. Sept. 16 at 130.

B. Downward Departures--Granted

[22] There were three grounds that were found, either separately or in combination, to support and justify a downward departure. The first was "Military, Civic, Charitable or Public Service; Employment-Related Contributions; Prior Good Works" § 5H1.11. Although not ordinarily relevant in determining whether a sentence should be below the Guidelines range, the evidence demonstrated that defendant's civic, charitable and public service and his good works were exceptional. *See* Introductory Commentary, Part H. His substantial contributions in the areas of substance abuse, children and youth,and juvenile justice were well documented and well recognized. Trs. Sept. 16 at 113-121; Sept. 17 at 31-32, 121-122, 135-136, 150-151.

[23] The second was extraordinary cooperation and restitution as a factor not adequately considered by the Guidelines, under § 5K2.0. See *United States v. Lieberman*, 971 F.2d 989, 996 (3d Cir.1992) (downward departure based in part on defendant's extraordinary post-conduct restitution and cooperation was proper under § 5K2.0); see also *United States v. Garlich*, 951 F.2d 161, 163 (8th Cir.1991) (Guidelines provide authority to depart downward based on extraordinary restitution under 5K2.0). Through the admirable work of the U.S. Trustee, the bankruptcy court, and Judge Dalzell of this court, the amount of the New Era loss was dramatically reduced from over $100 million to about $20 million. Revised PSR at ¶ 116; tr. Sept. 17 at 68-71. While defendant did not demonstrate an acceptance of personal responsibility as contemplated by U.S.S.G. § 3E1.1, his close cooperation and his early turn over of the bulk of his personal and company-held assets materially assisted

the process of reducing the loss and occurred to an unusual degree. In these circumstances, the post-offense restitution was *526 atypical and merited a downward departure under U.S.S.G. § 5K2.0. See *Lieberman*, 971 F.2d at 995 (noting that such a departure could be justified if extraordinary post-offense restitution existed either to a kind or a degree not considered by the Guidelines) (citing U.S.S.G. § 5K2.0, Policy Statement).

The third is more problematical -- a mental health "hybrid" departure involving "Diminished Capacity" under § 5K2.13, an encouraged factor, and "Mental and Emotional Conditions" under § 5H1.3, a discouraged factor.

> Section 5K2.13 Diminished Capacity (Policy Statement): If the defendant committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants,a lower sentence may be warranted to reflect the extent to which reduced mental capacity contributed to the commission of the offense, provided that the defendant's criminal history does not indicate a need for incarceration to protect the public.

[24] If a factor is encouraged under the Guidelines, it is a basis for departure unless the applicable Guidelines have taken it into account--which is not so in this case. *See* § 5K2.0, Policy Statement. Here, moreover, the offenses were non-violent and did not result from the use of drugs or other intoxicants, *see* § 5K2.13 and *United States v. McBroom*, 124 F.3d 533, 544 (3d Cir.1997), and defendant had no criminal record. The question was whether he suffered from "significantly reduced capacity." *Id.*

The subject of defendant's clinical condition and relevant diagnoses was hotly debated by a number of prestigious mental health professionals. Dr. Park Deitz, a well-known forensic mental health expert, testified as a government witness that there was no brain damage or mental illness. Tr. Sept. 18 at 49-52, 61; gov. exh. 4. In his view, there was evidence of "malingering" on tests, and while there was a narcissistic personality disorder, it did not impair defendant's cognitive or volitional capacity. *Id.* at 72, 74, and 76. On the other hand, another acknowledged psychiatric expert, Armond Nicholi, a defense witness, believed that defendant had a delusional disorder, *id.* at 82; deft. exh. 35 at 3-5. In the opinion of a prominent forensic psychiatrist, Dr. Robert Sadoff, also a defense witness, defendant had organic brain dysfunction, and was either delusional or subject to an intense fantasy. Deft. exh. 26 at 8-9. The defense experts thought that defendant's mental capacity was significantly reduced and, specifically, that the "anonymous benefactors" were the product of mental health impairment -- *i.e.*, were a genuinely held belief.

The court-appointed expert, Dr. Timothy Michals, a psychiatrist, disagreed -

> It is my opinion that Mr. Bennett has not experienced a Delusional Disorder nor has he had evidence of any mental disorder involving any cognitive dysfunctions .... It is my opinion that his claims of amnesia are of a volitional [nature] and not a component of any mental disorder .... In summary, it is my opinion which I express with a reasonable degree of medical certainty that Mr. Bennett did not suffer from a significantly reduced mental capacity at the time of the eighty-two

> charged offenses nor did he have evidence of a significantly reduced mental capacity which contributed to the commission of any of the eighty-two charged offenses.

Report of Dr. Timothy Michals, Sept. 11, 1997.

Other forensic experts who had tested and evaluated defendant expressed varying opinions as to his mental condition at the time of the indicted conduct. While it may be arguable whether defendant had a delusional disorder or more than mild organic brain dysfunction, there was clear evidence of several personality disorders--narcissism, hypomania, obsessive-compulsive personality, some of which was conceded by the government's experts. Tr. Sept. 18 at 74.

A complicating conceptual point is that personality disorders are listed in the authoritative "Diagnostic and Statistical Manual of Mental Disorders," DSM-IV, published by the American Psychiatric Association. However, many clinicians do not believe a personality disorder is more than a narrative description of one's personality. They therefore distinguish it from a mental disease or *527 disability and would reject it as a basis for a societal or legal judgment. See, *e.g.*, *United States v. Libutti*, 1994 WL 774647, *16 n.11 (D.N.J.1994) ("criteria for diagnosis of 'Pathological Gambling'" and quoting from DSM III-R: "The clinical and scientific considerations involved in categorization of these conditions as mental disorders may not be wholly relevant to legal judgments ...").

A number of Circuit Court cases have articulated and upheld that distinction. Examples are: *United States v. Withers*, 100 F.3d 1142, 1147-48 (4th Cir.1996), *cert. denied* --- U.S. ----, 117 S.Ct. 1282, 137 L.Ed.2d 358

(1997) (defendant's depression, causing "vulnerability and extreme mental disarray" did not warrant downward departure under § 5K2.13 when there was no evidence of cognitive impairment); *United States v. Edwards*, 98 F.3d 1364, 1371 (D.C.Cir.1996), *cert. denied*, --- U.S. ----, 117 S.Ct. 1437, 137 L.Ed.2d 544 (1997) ("If ... a psychological or behavioral disorder serves as the basis for [a 5K2.13] departure ... there must be an accompanying inability to reason"); *United States v. Barajas-Nunez*, 91 F.3d 826, 831 (6th Cir.1996) ("[D]iminished mental capacity is found where a defendant's condition affects his ability to process information or to reason"). However, our Circuit in *McBroom*, 124 F.3d at 549-550, expressly decided that Guidelines "Diminished capacity" included volitional disabilities that had been diagnosed as personality disorders ("cyclothymia" and obsessive-compulsive disorder).[28]

In the present case, defendant devised, developed and managed what became an extremely large financial

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[28] See also *United States v. Morin*, 124 F.3d 649, 651-52 (4th Cir.1997) (defendant's "narcissistic personality disorder" supported departure on the basis of diminished capacity); *United States v. Coleman*, 1997 WL 666512, *3, 5 (N.D.Ill.1997) (defendant's "dependent personality disorder," a factor in the commission of the offense conduct, was a valid basis for downward departure); *United States v. Skodnek*, 933 F.Supp. 1108, 1122 (D.Mass.1996) ("major depressive disorder," "psychotic disorder," and "obsessive compulsive personality disorder," resulted in diminished capacity that could be a basis for a downward departure).

enterprise. The evidence is that on one level he believed his work was consistent with his religious belief and God-ordained mission. Tr. Sept. 16 at 129-141, 145. He appears not only to have convinced himself -- the usual predicate of the empowerment to persuade others -- but he also persuaded a large number of community and business leaders. Many responsible, highly successful executives of religious, educational, and cultural institutions, as well as many social and political figures, considered him to be upright and beyond reproach. *E.g.*, tr. Sept. 19 at 103. Here, it may be questionable whether a departure should be attributed to an extraordinary mental and emotional condition (under discouraged factors) or to diminished capacity (under the encouraged factors). Regardless of one's point of view, defendant's cognitive faculties or volition, or both, appear to have been subject to some form of extraordinary distortion and, perhaps, significantly reduced capacity. That characterization of him was widely shared.[29]

[25] Whether taken separately or in combination -- *i.e.*, in parallel or in series -- or in conjunction with any other factors, these three downward departures supported a reduction of the sentence to 144 months of custody. They did not support any further reduction because of the gravity of the offense conduct, tr. Sept. 22

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[29] At sentencing -- two and a half years after New Era collapsed -- a former U.S. Secretary of the Treasury, who had invested and lost several million dollars, asked that defendant be sentenced to probation because he had meant well and had been blinded by his desire to help others.

at 9-10, and the other statutory bases for sentencing.[30] 18 U.S.C. § 3553(a).

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[30] A vocal segment of investors recommended an extremely severe or even "maximum" sentence. Tr. Sept. 22 at 12; gov. exh. 242, vol. one, victim impact letters -- *e.g.*, letter, United Way of Southeastern Pennsylvania, May 28, 1997: "We believe that the tremendous negative impact of Mr. Bennett's actions on hundreds of non-profit organizations, on the excellent reputations of numerous individuals and organizations, and on the image of those associated with philanthropy in general, warrants severe punishment .... [W]e urge the Court to provide the philanthropic community protection from schemes of this nature by sentencing Mr. Bennett to the maximum extent of the law."

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-1816

UNITED STATES OF AMERICA

v.

JOHN G. BENNETT, JR.,
Appellant

(D.C. Crim. No. 96-cr-00503)

SUR PETITION FOR REHEARING

Present: BECKER, Chief Judge, SLOVITER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, LEWIS and McKEE, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular serive not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,
s/Anthony Scirica
Circuit Judge

Dated: **Jan -7 1999**